LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 3 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Appellant,

vs.

UNITED STATES OF AMERICA and OLYMPIA PROVISION & BAKING CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant
501 Fifth Avenue
New York, N. Y.

WALDMAN & WALDMAN
Of Counsel

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	4
APPENDIX:	
Opinion, Findings of Fact and Conclusions of Law	1a
Final Judgment	24a

TABLE OF AUTHORITIES

Cases:

American Federation of Musicians v. Carroll, 391 U.S. 99 (1968)	7
Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959)	6
Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965)	6
Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940)	6, 9
National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1944)	6
Teamsters Local 626 v. United States, 371 U.S. 94 (1962)	6, 9
United States v. Dupont de Nemours & Co., 355 U.S. 316 (1961)	2

PAGE

Other Authorities:

Rules of the Supreme Court of the United States, Rules 13 and 15 1

Sherman Act, Sections 1 and 2 (15 U.S.C. Sections 1 and 2) 1

15 U.S.C. Section 29 2

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Appellant,

vs.

UNITED STATES OF AMERICA and OLYMPIA PROVISION & BAKING CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

In compliance with Rules 13 and 15 of the Rules of the Supreme Court of the United States, defendant-appellant Provision Salesmen & Distributors Union, Local 627 herewith submits its statement as to jurisdiction.

Opinion Below

The opinion rendered by the District Court has been reported in 282 F. Supp. 819.

Jurisdiction

(i) This is a civil action brought by the United States under Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2) charging the defendants with conspiring

to restrain trade in, and monopolize, the frankfurter industry in the metropolitan New York City area.

(ii) The decree of the District Court sought to be reviewed was dated September 26, 1968 and entered in the office of the Clerk of the United States District Court for the Southern District of New York on September 27, 1968. Reargument of the District Court's conclusions and decision was denied, prior to entry of the final decree, on September 17, 1968. Notice of appeal was filed with the Clerk of the United States District Court for the Southern District of New York on October 28, 1968.

(iii) Jurisdiction of the appeal is conferred upon this Court by 15 U.S.C. Section 29.

(iv) Cases sustaining jurisdiction of this appeal include *United States* v. *Dupont de Nemours & Co.*, 355 U.S. 316 (1961).

(v) The appeal does not involve the validity of any statute or treaty.

Questions Presented

This case involves the legality under the antitrust laws of certain collective bargaining provisions relating to owner-drivers of trucks in the New York frankfurter industry. These owner-drivers, also known as "distributors" or "agent-drivers", deliver frankfurters from a manufacturer's plant to customers on their route. The are in direct job and wage competition with unionized "house drivers", an admitted employee group who perform the same delivery function on behalf of the very same group of frankfurter manufacturers and also on behalf of competing frankfurter manufacturers and distributors in the same industry. The questions presented in the appeal are:

(1) In view of the extent of manufacturer control, exercised in connection with owner-driver routes, sales efforts, return of unused merchandise, and other aspects of the relationship between manufacturer and distributor, were the owner-drivers employees or independent contractors, for purposes of the antitrust laws.

(2) Does the Sherman Act forbid unionization and collective bargaining, in their own self-interest, of workingmen engaged in the type of physical labor performed by these owner-drivers, whether or not technically characterized as independent contractors.

(3) Assuming *arguendo* that these owner-drivers are independent contractors who may not engage in collective bargaining in their own self-interest, does their job and wage competition with admitted employee drivers justify, under the Sherman Act, (a) efforts by the appellant union to compel owner-drivers to become union members, and (b) provisions in the Union's collective bargaining agreements with the frankfurter manufacturers prescribing a minimum discount or differential between the manufacturers' own list price to the trade and the price charged by the manufacturer to the owner-driver, when this differential comprises the sole compensation to the owner-driver for his physical labor and substantially equals the cost to manufacturers of direct delivery through competing unionized employee drivers; and did the District Court err in enjoining all such conduct?

(4) Did the District Court err in excluding from evidence proferred testimony and Exhibits showing a large number of actual and attempted conversions of employee drivers into owner-drivers by frankfurter manufacturers in competition with the three defendant processors in the New York area.

(5) Does the evidence establish a combination or conspiracy, to which the appellant union was a party, to fix the price at which manufacturers would sell frankfurters to the retail trade?

Statement

Appellant union has been enjoined by the District Court from compelling owner-drivers to become union members and from bargaining collectively over minimum discounts or differentials for owner-drivers who deliver frankfurters from manufacturer's plant to retailer in the New York metropolitan area. These discounts or differentials not only constitute the measure of the owner-drivers' earnings for the work performed by them but also represent to the manufacturers the cost of indirect delivery of frankfurters as opposed to direct delivery costs through driver employees.

The complaint relates to three frankfurter manufacturers, only one of which was still in business at the time of trial.* These manufacturers were in regular, direct competition with other meat processors selling frankfurters to the same retail trade, largely through unionized employee drivers whose compensation consisted in part of commissions on the products sold by them.

Both the defendant manufacturers and their competitors distributed frankfurters through house drivers (admittedly employees) and through owner-drivers. The defendants assigned accounts to either employers or owner-drivers, as they saw fit, transferring customers from one to another to develop more convenient routes. Owner-drivers

---

* Of the three defendant manufacturers, two entered into consent judgments and one, Olympia Provision & Baking Co., Inc., defaulted at trial.

in fact serviced house accounts along their route on a commission basis, while also servicing their own customers.

The work performed by employee drivers and by owner-drivers was identical. Each owner-driver, like each employee, had his route which he serviced daily. The hours of work were the same—from shortly after midnight to early afternoon—dictated by the needs of the retailers for early morning delivery.

Each of the manufacturers rendered substantial assistance to owner-drivers in obtaining and retaining customers, through the efforts of its company sales personnel and through supplying free goods, equipment and even cash to potential or actual retail customers of the owner-drivers. Each manufacturer also accepted orders from customers of owner-drivers and serviced these customers during the owner-driver's illness or vacation, all without charge. Some owner-drivers even billed on company stationery.

Sabrett, the only defendant manufacturer still in business, laid out the owner-driver's route with him, actively supervised his operations and required the owner-driver to give up a customer whom he was unable to service adequately.

In no case was an owner-driver obligated to keep and pay for unsold merchandise. Each of the three manufacturers permitted owner-drivers to return for credit any frankfurters remaining unsold at the end of the day or week.

The record presents substantial questions meriting plenary consideration by this Court:

1. In light of the above and other facts, a serious question arises whether the owner-drivers, although respon-

sible for their own trucks and nominally "purchasers" of frankfurters for resale to their own customers, were not in fact "employees" or "workingmen" and fit subjects of unionization and collective bargaining on their own behalf, irrespective of any economic relationship with a parallel employee group, under the principles expressed in *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111 (1944).

2. Moreover, in view of the large number of owner-drivers and similar workers in American industry, the impact of the Sherman Act on the concerted economic efforts of persons performing the type of physical labor commonly associated with "workingmen", even though it be assumed *arguendo* that they are not "employees" in the common law sense, is another substantial question meriting the consideration of the Supreme Court. This issue, involving an aspect of the balancing of federal labor and antitrust policies, has not been authoritatively decided by this Court although it was raised in the concurring opinion in *Teamsters Local 626* v. *United States,* 371 U.S. 94 (1962).

3. The principal legal issue, both in the District Court and on this appeal, assumes *arguendo* that these owner-drivers are independent contractors who may not be unionized or subjected to collective bargaining regulation in their own behalf. The substantial question then arises as to whether the activities held by the District Court to violate the Sherman Act constitute legitimate union conduct in protection of the wage scale and job security of unionized drivers in economic competition and interrelationship with the owner-drivers. *Local 24; Teamsters* v. *Oliver,* 358 U.S. 283 (1959); *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.,* 311 U.S. 91 (1940); *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676

(1965), *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968).

Apart from bringing owner-drivers into the union as members, the sole challenged economic regulation relates to the discount or differential afforded the owner-drivers from the manufacturers' promulgated list price to the retail trade. This list price, because it was generally known to retailers, set the effective maximum price which the owner-drivers could charge to the customers serviced by them. Thus the full compensation to the owner-driver for his many hours of daily physical labor derived exclusively from the difference between the manufacturer's price to him and the list price, representing the maximum figure which he was able to charge his own customers.

In collective bargaining with the manufacturers, the defendant union negotiated a minimum differential designed to approximate the cost to the manufacturer of direct delivery through unionized employees. This negotiated minimum differential per pound of frankfurters substantially equalled the wage cost of a union truckdriver plus the manufacturer's truck expense.

In this way the union minimized the manufacturer's incentive to convert employee drivers into owner-drivers and to turn over employees' routes to owner-drivers. It also minimized the pressures to lower the wage scale, reduce the commission earnings, or eliminate the jobs of union drivers employed by competing manufacturers; for without a limitation on the differential afforded owner-drivers, the defendant manufacturers could enjoy lower labor costs than their competitors through the lower distribution expense of indirect, owner-driver delivery.

That these were real concerns appears from evidence that the defendant manufacturers did in fact convert em-

ployee drivers into owner-drivers and employee routes into owner-driver routes; that the manufacturers periodically computed the costs of direct, employee delivery and indirect, owner-driver delivery, concluding that indirect delivery was cheaper; and that Sabrett, the largest defendant manufacturer, regularly used the threat of conversion into owner-drivers as a club to keep down its employee-drivers' wages during contract negotiations. The evidence also showed substantial competition between the defendant manufacturers and their owner-drivers, on the one hand, and other processors employing large numbers of unionized employee drivers, on the other.

In light of this and other evidence in the record—and even the trial judge's own findings of fact—the appellant union contends that the contract provision in question is a legitimate union activity and not violative of the antitrust laws. Whatever the form of the agreement, it essentially involves wages—that is, compensation for physical work performed—and not prices. The grant of an injunction against the unionization of owner-drivers and the negotiation of this type of collective bargaining clause invades the province of lawful labor relations in an area of mandatory bargaining and threatens to undermine the balance between the labor and antitrust laws. Because the problem of owner-drivers is prevalent in American economic life and in view of the prior holdings of this Court, a substantial and serious question is presented.

4. The minimum differential for owner-drivers was first negotiated in about 1949, and the evidence shows that it was not confined to the collective agreements of the three defendant manufacturers but was also included in large numbers of contracts between the union and other New York frankfurter manufacturers. In this connection, the

defendant union sought to prove that in the pre-1949 period many of these competing frankfurter manufacturers had converted their employee-drivers into owner-drivers, in an effort to save delivery costs. The trial court refused to admit this testimony into evidence.

The proferred evidence was designed to show reason and justification for the union's inclusion of the challenged clause in its various collective bargaining agreements, since a history of repeated conversions from employee to nonemployee status is valid basis for union concern. Inasmuch as the trial judge's ultimate conclusion seems to rest upon the absence of any "legitimate labor objective" in the original 1949 contract provision, the exclusion of this evidence, which would have demonstrated the conditions experienced by the Union and its members in the preceding years, was particularly damaging.

The legal significance of employer conversions of employee drivers into owner-drivers, as justifying union regulation of the owner-driver's relationship with his manufacturer or supplier, was emphasized by this Court in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940) and *Teamsters Local 626* v. *United States*, 371 U.S. 94 (1962).

In addition the trial court excluded evidence of a similar attempt by a distributor of frankfurters to cut labor costs by converting employee drivers into independent contractors in the year 1960. This evidence was offered to show that the problem persisted over the years and justified continuing union efforts to equalize the compensation of owner-drivers and employee drivers.

5. The final issue in the case is the sufficiency of the evidence to show union participation in a single alleged

instance of employer price-fixing. The evidence on this point involves but a single meeting in 1956 and was the subject of only meager testimony.

The only direct evidence on the issue was the deposition testimony of a deceased witness who testified that at the conclusion of a meeting with the union called for other purposes, three manufacturers agreed on a common price increase. He was not even sure that any union representative was present at this phase of the meeting and he gave no testimony that any union representative heard this discussion or said even a word on the subject. Nor did the union take any subsequent action in this connection.

The union contends that this evidence is grossly insufficient to support the District Court's finding of union participation in the fixing of manufacturers' prices to their own house accounts.

We do not urge that this issue, standing alone, would warrant full oral argument before this Court; instead, we would have argued for summary reversal on briefs. But under the statute providing for direct appeals in cases such as these, there is no other forum available for appellate review; and in view of the other substantial questions which are presented, we urge that this point be considered as well.

Respectfully submitted,

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant

WALDMAN & WALDMAN
Of Counsel

APPENDIX

Opinion, Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civil 2031

UNITED STATES OF AMERICA,

Plaintiff,

—against—

OLYMPIA PROVISION & BAKING CO., INC. and PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Defendants.

APPEARANCES:

David H. Harris,
Irving Kagan,
Attorneys, Antitrust Division,
United States Department of Justice
Attorneys for Plaintiff
42 Broadway, New York, N.Y.

Waldman & Waldman
Attorneys for Defendant Provision Salesmen & Distributors Union, Local 627, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO
501 Fifth Avenue, New York, N.Y.

Seymour M. Waldman,
Paul R. Waldman,
Of Counsel.

LaPorte & Meyers*
Attorneys for Defendant
Superior Frankfurter, Inc.
74 Trinity Place, New York, N.Y.

Ernest S. Meyers,
Jules E. Yarnell,
Of Counsel.

Feldman, Kramer, Bam & Nessen*
Attorneys for Defendant
Sabrett Food Products Corp.
500 Fifth Avenue, New York, N.Y.

Arthur B. Kramer,
Of Counsel.

LEVET, D.J.

This civil antitrust action originally named two other defendants, to wit, Sabrett Food Products Corp. and Superior Frankfurter, Inc. However, the action as against said defendants was severed by order made orally in open court on November 8, 1967. Subsequently, a consent decree as to each of said defendants was signed and entered on December 18, 1967. Olympia Provision & Baking Co., Inc. ("Olympia") defaulted upon call of the case for trial; said default was duly ordered on November 8, 1967 and at that time said defendant waived any further notice

* Appearance only for the purpose of severance of defendant Superior Frankfurter, Inc.

under Rule 55, F.R.Civ.P. (4, 5;[1] Court's Ex. 1) The case then proceeded to trial against said defaulting defendant Olympia and against the above-mentioned union (hereinafter designated as "Local 627").

The general nature of this action is described by plaintiff as follows:

> "The Complaint, filed June 7, 1962, alleges that the defendants entered into a combination and conspiracy to restrain and monopolize interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act. The substantial terms of said combination and conspiracy were that, since at least 1949, the defendants and co-conspirators combined and conspired to fix and maintain prices, terms, and conditions of sale of frankfurters, to allocate customers and to boycott distributors not members of Local 627."

The case was tried before the court without a jury.

After hearing the testimony of the parties, examining the exhibits, the pleadings and the proposed findings of fact and conclusions of law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Local 627 is a voluntary association with its principal office located at 27 Union Square, New York, N.Y. From 1949 to approximately 1960 it maintained offices at 799 Broadway, New York, N.Y. It is a labor organization

---

[1] Unless otherwise designated, numbers in parentheses refer to pages in the stenographer's minutes of the trial.

duly chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

2. The membership of Local 627 is composed, in part, of persons known as distributors, who are also known as agent-distributors and agent drivers. From 1956 through 1962, Local 627 had approximately 2,000 members. Membership included approximately 300 persons employed as drivers, approximately 1,300 persons employed as salesmen-drivers or salesmen-distributors, and approximately 350 distributors, of whom less than 30 bought and resold the products of Sabrett Food Products Corp., Olympia Provision & Baking Co., Inc. and Superior Frankfurter, Inc. (1470, 1475-1476; Pl. Ex. 243, p. 47)

3. The following distributors have been members of Local 627 during all or part of the period from 1949 to 1962: Charles Alfano, Gus Avezidas, Joe Banner, M. Berger, Jordan Feinberg, Seymour Feinstein, Benjamin Goodman, Franklin B. Goodman, Ben Grupper, George Harris, Louis Kantrowitz, Charles Katcher, Ed Kaufman, John Lexis, Frank Masset, Fred Miller, Louis Pagliuca, Rocco Pagliotta, James Papalexis, Gus Pappas, John Passas, James Rinbis, William Schlesinger. (30-31; Pl. Ex. 242)

4. Morris Horn has served as Business Manager of Local 627 continuously from 1940 to 1962, having been elected to this office by the membership of Local 627 every three years; in 1962, when the title of this office was changed to Secretary-Treasurer, he was elected as Secretary-Treasurer and has served as such since. (Pl. Ex. 243,

p. 5; 561-566) Horn, from 1940, has served as the chief executive officer of Local 627. (565-566) Rudolph Block, from 1949 to 1957, Milton Hyman, from 1949 to approximately 1962, and Isidore Jaffe, from 1949 to approximately 1962, were officers, agents or employees of Local 627. Estelle Gilman was employed by Local 627 as Office Manager from 1948 through 1962. (637-638)

5. Local 627 has, since at least 1949, operated, through trustees appointed by it, a separate trust fund for welfare benefits for its members, known as the Provision Salesmen & Distributors Union, Local 627, Welfare Trust Fund ("Welfare Fund"). The Board of Trustees consists of nine members, almost all of whom are members of Local 627's Executive Board. (29, 641-643, 649-651)

6. By agreement with Local 627, Sabrett, Olympia and Superior made regular and continuous payments to this Welfare Fund until at least 1962. (29-30, 36, 609, 629-630, 632-645, 878, 880-881, 928-931, 1034-1035, 1057, 1061-1062; Pl. Ex. 243, pp. 42-43; Pl. Exs. 10, 11, 12)

7. Sabrett is a corporation organized and existing under the laws of the State of New Jersey and has its principal place of business in Jersey City, New Jersey. Sabrett, since 1949, has manufactured frankfurters in Jersey City, New Jersey, and also since 1949 has sold and distributed frankfurters in the State of New York, including the Southern District of New York.

8. Ferdinand Frankel was Vice-President of Sabrett from 1948 until approximately 1957. Julius Frankel has been an officer of Sabrett since approximately 1956. Gori

L. Cafora was employed by Sabrett as Sales Manager from approximately 1944 to approximately 1964.

9. Superior is a corporation organized and existing under the laws of the State of New York and it had its principal place of business in the Bronx, New York. Superior, commencing at least in 1949, manufactured, sold and distributed frankfurters in the State of New York, including the Southern District of New York. Superior ceased to do business in about 1964, the corporation has been dissolved; its plant was demolished. (1094, 1095)

10. Harry Gilman was President of Superior since approximately 1949. Harry Staub was Secretary-Treasurer of Superior from 1947 until 1962.

11. Olympia is a corporation organized and existing under the laws of the State of New York, and, during the period from 1949 to approximately 1962, it had its principal place of business in the Bronx, New York. From 1949 to approximately 1962, Olympia manufactured, sold and distributed frankfurters and transacted business in the State of New York, including the Southern District of New York. Olympia is no longer under operation; it sold its plant to a division of Zion Foods about 1961 or 1962 and apparently has not since manufactured or sold frankfurters. (942-943)

12. Christ Papalexis was President of Olympia from 1946 to 1957. Gregory Papalexis was General Manager of Olympia from 1946 to 1957.

13. From 1949 to 1962, Sabrett, Olympia and Superior manufactured, sold and distributed frankfurters to house

account customers which consisted primarily of refreshment stands, luncheonettes and street vendors and to distributors who resold such frankfurters to the same types of customers. (35, 44, 105-107, 180-181, 424, 426-427, 433, 541, 553, 555-556, 654-655, 659, 714, 717, 719, 793, 820-821, 853-857, 994-996, 1029-1031, 1038-1039, 1159-1161, 1168, 1206, 1210, 1213, 1216-1218, 1348-1358, 1384-1389; Pl. Ex. 261, pp. 6-14)

14. Sabrett, Olympia and Superior from 1949 until at least 1962 were engaged in interstate and foreign commerce in the manufacture, sale and distribution of frankfurters, and the amount of such commerce was substantial. (34, 82, 488, 543-544, 717-719, 739, 798, 847-850, 1026-1030, 1153, 1168, 1205-1219, 1348-1349)

15. Part of the frankfurters manufactured by Sabrett, Superior and Olympia were delivered in the metropolitan New York area by salesmen, also known as "house drivers." (853-857, 1032, 1212, 1213)

16. The Sabrett, Olympia and Superior salesmen delivered frankfurters by truck to customers or "stops" on their route—such customers being billed by their respective employer and known as "house accounts." The salesmen received as compensation a base salary and a percentage commission based on the gross selling price of the products delivered by them. (856-857, 980-981, 1032, 1191-1193)

17. Sabrett salesmen were charged out for the frankfurters they picked up daily at the Sabrett plant and were responsible for either the return of the merchandise or

the moneys received from customers. Salesmen were not responsible for bad debts of the customers unless they had extended credit in disregard of specific instructions of their employer. (1160-1163, 1174-1175, 1181, 1188, 1368-1376)

18. During the years 1956 to 1962, Sabrett salesmen operated only in the State of New York, and they are members of the International Brotherhood of Teamsters. In New Jersey, frankfurters manufactured by Sabrett were distributed exclusively by non-union distributors. (1218-1222)

19. The Olympia and Superior salesmen were members of Local 802, International Brotherhood of Teamsters, and the terms and conditions of their employment were set forth in written collective bargaining agreements between Local 802 and their respective employer. (852-853, 1032, 1081)

20. With the execption of those non-union Sabrett distributors which operated in New Jersey, distributors for Sabrett, Olympia and Superior were members of Local 627. (922, 1031-1032, 1280-1281)

21. The distributors picked up frankfurters daily at the manufacturers' plants and, using their own or rented trucks, they delivered the frankfurters to customers on their routes. Frankfurters distributed in this manner were charged out daily, and the distributors were billed weekly by the manufacturers. (231-234, 707, 709, 718, 748-749, 937-938, 1033)

22. Originally, when distributors of Sabrett, Superior and Olympia frankfurters began operations as such, all drove their own trucks and performed all the labor necessary (50, 342-343); most of the operators continued to operate without employees or helpers. (18, 706-708, 740-741, 749, 1398; DU Ex. 116, p. 31)

23. In the 1950s, a few distributors initiated or acquired additional routes and, in some instances, formed partnerships or corporations which employed drivers. These distributors entered into collective bargaining contracts with Local 627 which covered their employees. (50, 57, 74-79, 367, 413-414, 422, 429, 431-432, 489-491, 518, 992-994, 1385-1386; DU Ex. 115)

24. Occasionally, distributors delivered frankfurters to certain house accounts of the manufacturers. Such distributors received as compensation a credit or commission computed on the basis of the poundage delivered; and, in the case of Sabrett, some house accounts were serviced by distributors for a flat weekly compensation. (47-48, 69, 343, 364-366, 751, 938, 1035-1036, 1076, 1219, 1318-1319, 1403-1404)

25. Sabrett, Superior and Olympia accepted telephone orders from distributors' customers, communicated such orders to distributors without charge. (371, 756, 1036-1037, 1403; DU Ex. 116, pp. 32-33)

26. If a distributor was out delivering frankfurters and a customer called in with an order to be filled that day, the manufacturer, as an accommodation, would have delivery made to the customer by a house driver. The dis-

tributor was charged only for the actual merchandise, not for any cost of delivery. (1079-1080)

27. Certain Sabrett, Superior and Olympia distributors billed on company letterheads and received checks made out to the company which they gave the company in payment for merchandise distributed by them. Sabrett house drivers also had stops which they billed and for the collection of which they were responsible. (659-661, 667-668, 740, 757, 761, 1396-1397; DU Ex. 116, p. 33)

28. When a distributor was ill or incapacitated, the supplier would usually have his route serviced by a house driver as an accommodation, without cost to the distributor. Lists of distributors' customers were kept for this purpose. (756, 1037, 1317)

29. In at least one instance, Sabrett furnished a distributor with free uniforms and cleaning service. (770-771)

30. In at least one instance, Sabrett refused to deal with a distributor who owed the company money for merchandise billed to him. (837-841)

31. The distributors operated as individuals, partnerships or corporations. (51, 74-75, 175, 180, 422-423, 427, 664-665, 739, 1384)

32. The distributors purchased frankfurters from the manufacturers for resale to the distributors' own customers and for the distributors' own account and profit. (36, 44-46, 55, 59-60, 67-71, 105, 179, 182, 187-188, 206, 426-427, 429-430, 433, 659-663, 668-671, 699, 709, 716-717, 719,

740, 794-795, 1033, 1251, 1321, 1392-1393, 1395-1398, 1416-1417, 1548; Pl. Ex. 261, pp. 8-9)

33. The distributors purchased products, such as mustard and condiments from sources other than the frankfurter manufacturers for resale to their own customers for their own account and profit. (72, 181, 230, 433-434, 717)

34. The distributors declared income from the conduct of their businesses and paid federal, state and local taxes thereon as self-employed individuals or as partnerships or corporations. (52, 64, 189, 547-548, 663, 671-672, 739; Pl. Exs. 244, 245)

35. The distributors did not receive a wage or salary from the manufacturers with whom they dealt nor were any taxes withheld by the manufacturers on their behalf. (35-36, 1164-1166)

36. The distributors purchased frankfurters from more than one manufacturer and occasionally changed manufacturers. (164, 180-181, 376-377, 880, 1018-1019, 1323-1324, 1352-1358, 1390, 1396; Pl. Ex. 261, pp. 12-13)

37. The distributors owned or leased the trucks used in the conduct of their businesses and paid all expenses in connection with the maintenance and operation thereof. (44, 56, 70, 76, 106, 180-181, 188, 428-429, 659, 672, 713, 794, 1034, 1410)

38. The distributors established their own prices with their own customers. (68-70, 208-209, 231, 236-237, 518-519,

1321-1323) They also established the terms and conditions of sale with their own customers and suffered almost all bad-debt losses incurred in such sales to their own customers. (49-50, 68, 182, 695, 708, 742, 796, 1416)

39. The distributors determined their own hours and days of work, consistent with the needs and demands of their own customers. (37, 58-59, 80-81, 187, 235-236, 518, 695, 741, 797, 1033-1034, 1399)

40. The distributors purchased and sold their customer routes, which included substantial goodwill. (50-51, 79, 106, 177-178, 186, 657-658, 713, 716, 1386, 1409-1410, 1412)

41. As an accommodation to the distributors, the suppliers allowed return of defective or unsold frankfurters for credit. In practice, however, much unsold merchandise was retained by the distributors in their refrigerated trucks for future sales. (371, 708-709, 768, 1078, 1380-1381, 1395-1396, 1417-1420; DU Ex. 116, p. 34)

42. Except for the fact that Sabrett reserved for itself, as a matter of policy, the right to observe the operations of a distributor and approve the qualifications of a distributor who might succeed to the route of an existing distributor, the distributors were not under the dominion, direction or control of their suppliers in the conduct of their business operations. (36, 58-59, 80-81, 105, 189, 421, 695, 702-703, 709, 741, 755-756, 797, 821, 1033-1034, 1307-1308, 1314, 1323-1324, 1333-1334, 1347, 1377-1379)

43. The distributors are not employees of the frankfurter manufacturers. They are independent businessmen

who contracted with their customer accounts to supply goods.

44. In or about 1946, membership in Local 627 was sought by the distributors, whose primary goal was to attain larger profits. The distributors were not solicited by the union (574-578), and at that time there were no other frankfurter distributors in Local 627. (583-584)

45. During the period between 1940 and 1946, the union leadership had no information whatever that any operation of the frankfurter distributors was affecting the welfare of the other members of Local 627. (584)

46. The frankfurter manufacturers' use of distributors, during the period immediately preceding the time the distributors joined Local 627, had no adverse effect upon the wages and working conditions of their employee-drivers, or in any way represented an attempt to evade the union wage scales of such employees.

47. Some degree of competition for customer accounts existed between distributors who purchased frankfurters primarily from one manufacturer and those who purchased from other manufacturers. In addition, the distributors occasionally gained and lost customer accounts to and from manufacturers, other than their own, who serviced customers through salaried house drivers. (190-194, 199, 202-211, 236-238, 302-306, 317, 385-390, 409, 538-543, 553-556, 750, 772-778, 1399)

48. At times, for convenience and efficiency, the manufacturers turned over routes and customer accounts to

distributors (43, 334-337, 355-356, 361, 750, 793-794, 820-821, 1256-1257, 1315-1316, 1350-1352, 1387-1394); and, occasionally, customers of the distributors were turned over to the manufacturers for servicing as house accounts. (767, 1308-1314)

49. The frankfurter manufacturers never attempted to set their employee-drivers and distributors against one another for the purpose of affecting the wages or working conditions of either group at any time during the period in question.

50. Wages of the house drivers employed by frankfurter manufacturers were periodically increased during the period between 1946 and 1962 (415, 1036-1037, 1082, 1222; DU Ex. 115); but such wage increases were not related in any manner whatever to the activities of Local 627 on behalf of the distributors.

51. The proof is clear that there was no legitimate labor objective served through the membership of the distributors in Local 627.

52. Commencing in 1949, when the distributors sought and received admission to membership in Local 627, the distributors conspired among themselves and with Morris Horn of the union to secure from the manufacturers increases in the discounts allowed. Between 1949 and 1956 the minimum discount to the Sabrett, Superior and Olympia distributors was increased, in many instances, to at least 5¢ per pound. (38, 134, 165, 251-259, 260-262, 274, 461, 510-513, 560, 808, 819-820, 874, 881-882, 1040-1042, 1046,

1129-1132, 1143-1144, 1445-1449; Pl. Ex. 243, pp. 62-63; Pl. Ex. 261, pp. 47-48)

53. In or about August 1956, the distributors together with Morris Horn conspired and successfully obtained a further minimum discount from the manufacturers, which raised the minimum discount for all distributors to 8¢ per pound. (37-38, 165-167, 174, 262-268, 271-277, 394-395, 452-456, 459-463, 466, 477-479, 486, 493, 551-552, 614-625, 724-730, 732-735, 737, 798-803, 808-809, 819-820, 843-844, 881-911, 959-963, 1067, 1101, 1506-1508; Pl. Exs. 3, 4, 16, 17, 189, 190, 192, 193, 220; Pl. Ex. 243, pp. 33-34, 53-57)

54. In connection with the increased discount concession which was extracted in 1956, Local 627, represented by Horn, conspired with Sabrett, Superior and Olympia, whereby it was agreed that each manufacturer would increase its list selling price by 5¢ per pound. Subsequently, in furtherance of this conspiracy, the list selling price of such manufacturers were so increased. (277-279, 719-736, 808-809, 819-820, 890-911, 961-962; Pl. Exs. 4, 16, 17, 24; Pl. Ex. 261, pp. 48-60)

55. During the period from 1949 to 1962, Local 627 and its distributor-members doing business with Sabrett, Olympia and Superior conspired and attempted to obtain an agreement with such manufacturers pursuant to which the manufacturers would boycott and refuse to deal with non-union distributors. Their efforts in this endeavor were largely successful. (30-31, 36-38, 95, 108-109, 425, 606-607, 672-680, 719, 720, 795, 855-856, 868, 871, 874, 922-928, 948-949, 1002-1008, 1011-1012, 1029-1032, 1159-1160, 1210-1211,

1280-1283, 1476, 1496-1497, 1546-1547; Pl. Exs. 10, 11, 12, 242; Pl. Ex. 243, pp. 47-48, 62; Pl. Ex. 261, pp. 11-13, 18-19)

56. At all relevant times Local 627 had knowledge of and acquiesced in the acts of its members and agents, and participated in the conspiracy herein. (134, 138-141, 149-152, 165-167, 169-172, 174, 252-259, 262-265, 275-277, 290-294, 296-298, 300-302, 318-324, 388, 407-409, 448, 452-456, 464, 467-471, 477-479, 481-482, 510-513, 535-538, 561-567, 624, 639-643, 728-730, 732, 798-802, 808-815, 825, 843-844, 862-871, 873-876, 878, 880-911, 922-931, 935-936, 946-947, 955-956, 959-963, 970-973, 1002-1008, 1018-1022, 1049-1062, 1132-1133, 1137, 1143-1144, 1278-1280, 1282, 1337-1341, 1367, 1383, 1414-1416, 1445-1459, 1461, 1463, 1465, 1474-1476, 1492-1496, 1502-1504, 1506-1508; Pl. Ex. 243, pp. 3-5, 21-30, 33-34, 42-44, 49-54, 56-57, 62, 71-73; Pl. Ex. 261, pp. 19-21, 34-35, 38-44, 48-54, 60-63, 165, 175, 177, 179-180; Pl. Exs. 3, 5, 10, 11, 12)

57. Plaintiff has not shown by a fair preponderance of the credible evidence that any agreement among the various distributors or among the distributors, Local 627 and the manufacturers existed to the effect that customers could be allocated among the various parties in return for promises not to compete.

DISCUSSION

A. The Labor Exemption

In general, the first and second sections of the Sherman Act embrace " * * * every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." United States v. American Tobacco

Co., 221 U.S. 106, 181 (1911). From this broad-based coverage, Congress has carved exceptions. 15 USC § 17 states, in substance:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor * * * organizations, * * * or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof * * *."

As early as 1921, however, it was recognized that this section of the antitrust law gave labor no grant of a blanket exemption from the Sherman Act. In Duplex Printing Press v. Deering, 254 U.S. 443 (1921), the Supreme Court ruled that labor organizations could not escape antitrust prohibitions " * * * where [unions] depart from * * * normal and legitimate objects * * *." 254 U.S. at 469. See also United Mine Workers v. Pennington, 381 U.S. 657 (1965). Recently, in an extensive and scholarly opinion, which takes into account the manifold developments affecting the nature and extent of labor's antitrust exemption since its inception, Judge Wilson summarized that:

> " * * * a labor union is exempt from the operation of the federal antitrust laws provided that it acts unilaterally, in the pursuit of its own self-interests rather than in combination or conspiracy with non-labor groups and provided further that its activities be in furtherance of a subject matter of immediate and legitimate union concern, such as wages, hours and working conditions, and not in furtherance of matters

> which are only of indirect concern to the union, such as prices and other marketing factors." Ramsey v. United Mine Workers of America, 265 F. Supp. 388, 398 (E.D.Tenn. 1967).

Thus, at the outset, the applicability of labor's antitrust exemption to Local 627's activities on behalf of its distributor-members is at issue, and, based upon the clear proof adduced, I conclude that the defendant's acts are not exempt.

The distributors represented by Local 627 are independent businessmen who contracted both with their own customers and with the manufacturers to purchase and supply merchandise. The distributors are not employees of the manufacturers.

To distinguish independent contractors from employees, the "usual test * * * is found in the nature and the amount of control reserved by the person for whom the work is done." Taylor v. Local No. 7, International Union of Journeymen Horseshoers, 353 F. 2d 593, 596 (4th Cir. 1965), cert. denied, 384 U.S. 969 (1966); see also Singer Manufacturing Co. v. Rahn, 132 U.S. 518 (1889). Furthermore, even complete control over desired results may be insufficient to transform independent contractors into employees.

> " * * * an employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee." N.L.R.B. v. Steinberg, 182 F. 2d 850, 856-857 (5th Cir. 1950).

The question of whether control exists sufficient to characterize contractors as employees must be decided upon the particular facts of each case and no one fact is determinative; "the totality of the circumstances must be considered." Taylor v. Local No. 7, supra at 596; N.L.R.B. v. A.S. Abell Co., 327 F. 2d 1, 5 (4th Cir 1964).

By reason of the facts appearing in Findings 21 through 43, the proof is clear that the distributor-members of Local 627 are properly characterized as independent contractors rather than employees of the manufacturers. Those instances in which the manufacturers may have given some aid to the distributors or exerted some control over distributors' actions do not overcome the effect of the overwhelming evidence which illustrates the distributors' independent status.

That the distributor-members of Local 627 were independent contractors rather than employees does not, standing alone, remove the actions of the defendant-union from the protective shield of labor's antitrust exemption. See, e.g., Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940). However, since a fundamental conflict exists between the policies which underlie labor and antitrust legislation, the activities of labor organizations on behalf of those of their members who have the status of independent contractors must be closely scrutinized before antitrust exemption may properly be allowed.

Only where union-imposed restraints upon the labor market directly yield immediate benefits to the legitimate interests of labor organizations, and where the relative impact upon the product market is indirect and consequential, have such activities been protected. In these

cases, an implicit balancing of interests has permitted the effectuation of labor policies without doing violence to antitrust considerations. See Pevely Dairy Co. v. Milk Wagon Drivers, 174 F. Supp. 229 (E.D.Mo. 1959), appeal dismissed, 283 F. 2d 519 (8th Cir. 1960); Local 24 v. Oliver, 358 U.S. 283 (1959); Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., supra; cf. Local 189 v. Jewel Tea Co., Inc., 381 U.S. 676 (1965).

On the other hand, where union activities have been aimed directly at commercial competition (such as price fixing or boycotts) antitrust considerations have prevailed despite the labor interests sought to be protected or advanced thereby. See Los Angeles Meat Drivers v. U.S., 371 U.S. 94 (1962); Columbia River Packers v. Hinton, 315 U.S. 143 (1942); cf. United Mine Workers v. Pennington, supra.

Furthermore, agreements between unions and a non-labor organization for anti-competitive purposes need not be explicit but may be inferred from activities and surrounding circumstances when there is clear proof of union participation or authorization. United States v. Fish Smokers Trade Council, Inc., 183 F. Supp. 227 (S.D. N.Y. 1960); United States v. Milk Drivers Union, 153 F. Supp. 803 (D.Minn. 1957).

In the present case, defendant-union's activities on behalf of its distributor-members were not in furtherance of any legitimate labor interests or objectives. The distributors, acting as independent contractors, sought admission to Local 627 for their own purposes, and the sole interest served by the union was that of this group of independent businessmen. (Findings of Fact 44 through 51) Absent the justification of a legitimate labor objective, defendant-

union's activities which were aimed directly at commercial competition are not immune from antitrust liability.

B. Antitrust Violations

It is elementary that price-fixing is illegal per se, United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Effect, rather than form, is the determining element. United States v. Socony-Vacuum Oil Co., Inc., supra; Plymouth Dealers' Ass'n v. United States, 279 F. 2d 128 (9th Cir. 1960).

The uniform minimum discounts and the increases of same which defendant union secured for its distributor-members (Findings of Fact 52, 53) constituted illegal price fixing under the circumstances herein. Such discounts fixed the price paid the manufacturers by the distributors and this, in turn, bore directly upon the ultimate prices paid by consumers. Indeed, the increases in distributor discounts were followed quickly by increased retail prices. (Finding of Fact 54) Further, the evidence is clear that Horn, acting as an agent of defendant-union, conspired with the manufacturers and participated in a scheme whereby it was agreed that retail prices would be uniformly increased to compensate for increases negotiated for the distributors' discounts. (Finding of Fact 54)

It also is elementary that boycotts and attempted boycotts are illegal. United States v. General Motors Corp., supra; Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators Guild of America v. F.T.C., 312 U.S. 457 (1941). Thus, defendant-union's largely successful attempts to enforce agreements with

the manufacturers to the effect that only members in good standing of Local 627 should be allowed to distribute frankfurters are illegal under the circumstances herein. (See Finding of Fact 55)

Defendant-union had knowledge of, acquiesced and participated in all illegal acts of its member, employees and agents. (Finding of Fact 56) Explicit authority to the union's agents and officials need not be granted; such agency may be implied. 2 C.S.J. Agency, § 23, pp. 1045-1050.

In conclusion, the proof is clear that antitrust liability must attach to defendant-union for the reasons stated.

Conclusions of Law

1. The court has jurisdiction of this cause and of the defendants herein under the provisions of the Act of July 2, 1890, commonly known as the Sherman Act (15 USC §§.1, 2).

2. The distributors herein are independent contractors.

3. The activities of defendant-union on behalf of its distributor-members served no legitimate labor objective.

4. The activities of defendant-union on behalf of its distributor-members are not exempt from the antitrust prohibitions of the Sherman Act (15 USC §§ 1 and 2).

5. Beginning at least as early as 1949 and continuing thereafter until at least 1962, Sabrett, Olympia, Superior, Local 627 and the distributor-members thereof who dealt with Sabrett, Olympia and Superior combined and conspired to restrain and monopolize the manufacture, sale and distribution of frankfurters by means of price fixing

and boycott agreements in violation of Sections 1 and 2 of the Sherman Act.

6. Local 627 had knowledge of and acquiesced in all of the aforementioned acts of its officers, agents, employees and members and participated in the agreements and understandings entered into herein.

7. Plaintiff is entitled to equitable relief enjoining defendant Local 627 and the defaulting defendant Olympia from violations of Sections 1 and 2 of the Sherman Act and such additional relief as may be appropriate in accord with the determination herein, together with costs.

Settle judgment on notice.

Dated: New York, N.Y.
April 5, 1968.

RICHARD H. LEVET
United States District Judge

Final Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ. 2031

UNITED STATES OF AMERICA,

Plaintiff,

v.

OLYMPIA PROVISION & BAKING CO., INC. and PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on June 7, 1962; the defendants Olympia Provision & Baking Co., Inc. (hereinafter "Olympia"), Provision Salesmen & Distributors Union, Local 627, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter "Local 627"), Sabrett Food Products Corp. (hereinafter "Sabrett") and Superior Frankfurter, Inc. (hereinafter "Superior"), having appeared and filed their several answers; the action having been severed as against the defendants Sabrett and Superior, and each having consented to the entry of separate judgments against them, which judgments were entered on December 18, 1967; the defendant Olympia having defaulted upon the call of this action for trial and having waived any further notice herein under Rule 55 of the Federal Rules of Civil Procedure; the matter having been tried against the defaulting defendant Olympia and the defendant Local

627 from November 8, 1967 to November 19, 1967; and the Court having entered its Opinion, Findings of Fact and Conclusions of Law on April 5, 1968,

NOW THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of this cause and of the defendants herein under Section 1 and 2 of the Act of Congress of July 2, 1890 (15 U.S.C. §§1, 2), as amended, commonly known as the Sherman Act. The defendants Olympia and Local 627, and Sabrett, Superior and the distributor-members of Local 627 who dealt with Olympia, Sabrett and Superior, have combined and conspired to restrain and monopolize the manufacture, sale and distribution of frankfurters by means of price-fixing and boycotting agreements in violation of Section 1 and 2 of the Sherman Act.

II

As used in this Final Judgment:

(A) "Person" shall mean an individual, partnership, corporation, association, or other business or legal entity;

(B) "Distributor" shall mean any person who is an independent contractor engaged in the business of buying frankfurters from Sabrett, Superior, or Olympia and reselling them to retail outlets for his own account and profit or any subsidiary, successor, or assign of any such person;

(C) "Sabrett" shall mean Sabrett Food Products Corp., a corporation organized and existing under the

laws of the State of New Jersey, with its principal place of business in Jersey City, New Jersey, its subsidiaries, successors and assigns and its directors, officers, trustees, agents and employees;

(D) "Superior" shall mean Superior Frankfurter, Inc., a corporation organized and existing under the laws of the State of New York with its principal place of business in the Bronx, New York, its subsidiaries, successors and assigns and its directors, officers, trustees, agents and employees;

(E) "Meat Products" shall include frankfurters, meat patties, sausage nd similar items.

III

The provisions of this Final Judgment shall apply to the defendants Olympia and Local 627 and to their respective directors, officers, trustees, agents, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with either such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

The defendant Olympia is enjoined and restrained from directly or indirectly entering into, adhering to, renewing, maintaining, furthering, enforcing, participating or acquiescing in, or claiming any rights under any contract, agreement, combination, conspiracy, understanding, plan, program, or course of action with any person to:

(A) Fix, establish, maintain or adhere to prices, discounts, differentials, or other terms or conditions,

for the sale and distribution of meat products to any third person, including distributors;

(B) Boycott, or otherwise refuse to sell meat products to any person.

V

The defendant Local 627 is enjoined and restrained from directly or indirectly:

(A) Entering into, adhering to, renewing, maintaining, furthering, enforcing, participating or acquiescing in, or claiming any rights under any contract, agreement, combination, conspiracy, understanding, plan, program or course of action with Sabrett, Superior, Olympia, a distributor or with any of the foregoing to:

(1) Fix, establish, maintain, or adhere to prices, price discounts, or price differentials for the sale and distribution of meat products by Sabrett, Superior, Olympia, a distributor or by any of the foregoing to any third person, including distributors;

(2) Boycott, or otherwise refuse to sell meat products to any distributor because of such distributor's failure or refusal to become a member, or because of such distributor's prices, price discounts, or price differentials for the sale of meat products;

(B) Persuading, inducing, coercing, or compelling, or attempting to persuade, induce, coerce or compel, Sabrett, Superior, Olympia, a distributor or any of the foregoing by boycott, strikes or picketing, or

by threats thereof, or by any other means, to do or participate in the doing of any of the things set forth in Subsection (A) of this Section V, including Subparagraphs (1) and (2) of such Subsection (A).

VI

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to either of the defendants Olympia and Local 627 made to their principal offices, be permitted, subject to any legally recognized privilege.

(A) Access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

Upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, the defendants Olympia and Local 627 shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment. No

information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person except a duly authorized representative of the Executive Branch of the United States of America, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VII

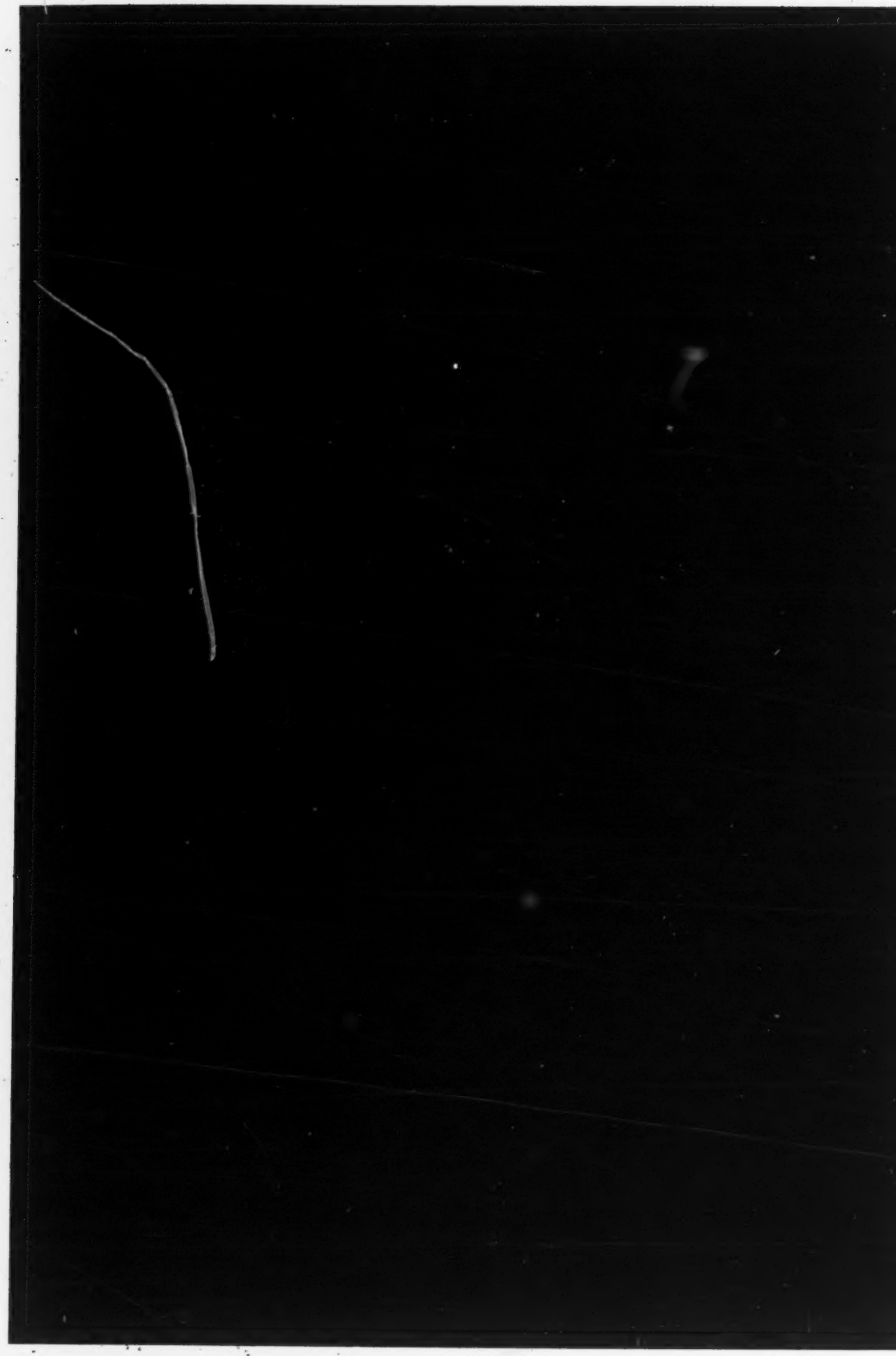
Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction of or the carrying out of this Final Judgment, or for the modification of any of the provisions thereof, and for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance therewith, and the punishment of violations thereof.

Dated: New York, New York
September 26, 1968

RICHARD H. LEVET
United States District Judge

Judgment Entered

JOHN J. OLEAR, JR.
Clerk



INDEX

	Page
Statement	1
Argument	5
Conclusion	11
Appendix	13

CITATIONS

Cases:

Allen-Bradley Co. v. *Local Union No. 3*, 325 U.S. 797	6
American Federation of Musicians v. *Carroll*, 391 U.S. 99	2, 6, 7, 10
Columbia River Packers Assn. v. *Hinton*, 315 U.S. 143	10
International Boxing Club v. *United States*, 358 U.S. 242	11
Local 24, Teamsters Union v. *Oliver*, 358 U.S. 283	6, 8
Local 189, Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676	6, 10
Los Angeles Meat Drivers Union v. *United States*, 371 U.S. 94	6, 8, 10
Milk Wagon Drivers' Union v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91	6
Taylor v. *Local No. 7, International Union of Journeymen Horseshoers*, 353 F. 2d 593, certiorari denied, 384 U.S. 969	7

Statutes and rule:

Section 6 of the Clayton Act, 15 U.S.C. 17	6
Norris-LaGuardia Act, 29 U.S.C. 101–115	5, 6

330-663—69——1

Statutes and rule—Continued

	Page
Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2	1
Federal Rules of Civil Procedure:	
Rule 52 (a)	11
Rule 55	2

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of the district court (J.S. 24a–29a) enjoining and restraining the appellant and others from engaging in concerted price fixing in the sale and distribution of meat products manufactured by the defendant producers and from boycotting or inducing the boycotting of distributors who are not members of the appellant union, in violation of Sections 1 and 2 of the Sherman Act.

The complaint charged that the appellant union

and three producers of frankfurters in the New York metropolitan area, Olympia Provision and Baking Co., Inc., Sabrett Food Products Corp., and Superior Frankfurter, Inc., had, since at least 1949, combined and conspired to fix and maintain prices, terms and conditions of sale for frankfurters, to allocate customers and to boycott distributors who did not belong to the defendant union (J.S. 3a). Defendants Sabrett and Superior were severed and subsequently entered into consent judgments; defendant Olympia defaulted and waived further notice under Rule 55 of the Federal Rules of Civil Procedure (J.S. 2a–3a). After trial the court found that the appellant had conspired to fix and maintain prices and to boycott non-member distributors but that the government had failed to show any agreement to allocate customers. The appellant filed a petition for rehearing based in part upon this Court's intervening decision in *American Federation of Musicians* v. *Carroll,* 391 U.S. 99. After reargument, the court, in a memorandum opinion,[1] distinguished the *Carroll* case, denied appellant's motion for dismissal and entered its final judgment.

During the period covered by the complaint, Sabrett, Olympia and Superior manufactured frankfurters and sold them to customers such as refreshment stands, luncheonettes and street vendors. The products were distributed both directly through employee-drivers of the defendant manufacturers, and through independent distributors who bought from the manufacturers and resold to similar customers (F. 2,

[1] Since this opinion is not included in the jurisdictional statement, it is printed as Appendix "A" to this motion.

13).[2] Distributors of defendant manufacturers belonged to appellant union, Local 627, which was comprised principally of other manufacturers' employee-drivers, salesmen-drivers and distributors (F. 2). Employee-drivers of the defendant manufacturers were not members of the appellant union; all were members of Locals 194 and 802 of the International Brotherhood of Teamsters. (F. 18, 19; Tr. 852–853, 1032, 1221–1222.)

Employee-drivers or "house drivers" of the defendant manufacturers received a basic salary plus commission, were not responsible for extending credit, and delivered to customers of their employers which were known as "house accounts" (F. 16, 17; Tr. 856–857, 980–981, 1160–1163, 1368–1376). The distributors who were members of Local 627 did not receive a wage or salary from the manufacturers; rather they purchased products from the manufacturers at a price calculated by subtracting an established discount from the list price at which the manufacturer sold to its house accounts, and then resold to their own customers at prices and on terms and conditions of sale which they independently established (F. 32, 35, 38; Tr. 44–46, 68–70, 187–188, 236–237, 1164–1166). The distributors operated as self-employed individuals, partnerships or corporations and paid taxes as such (F. 31, 34; Tr. 74–75, 547–548; Pl. Exs. 244, 245). They owned or leased the trucks they used, bore the expenses of maintenance and operation of

[2] "F." denotes findings of fact by the court below, reprinted at J.S. 3a–16a; "C." denotes the district court's conclusions of law, reprinted at J.S. 22a–23a; "Tr." refers to the transcript of proceedings in the court below.

the trucks, and suffered "almost all" bad-debt losses incurred in sales to their customers (F. 37, 38; Tr. 180–181, 428–429). In some instances the distributors employed persons to assist them in the conduct of their business. In these cases the distributors entered into collective bargaining contracts with Local 627 covering these employees (F. 23; Tr. 413–414, 1385–1386).

On the basis of these and other facts, the court held that the distributors were independent businessmen rather than employees of the defendant manufacturers (F. 43; C. 2). The court further found and concluded that the activities of the independent distributors had no adverse effect upon the wages or working conditions of employee-drivers and that the activities of the union on behalf of its distributor members served no legitimate labor objective (F. 46, 51; C. 3).

The independent distributors had sought membership in the union in about 1946 in order to attain larger profits (F. 44). The distributors were not solicited for membership in the union, and prior to their joining there were no other distributors in Local 627 (F. 44; Tr. 574–578, 583–584). After the distributors became members of the union, the union negotiated on their behalf a uniform minimum discount to be used by the manufacturers in calculating their prices to the distributors (F. 52–54). The union and the manufacturers also agreed that the latter would refuse to deal with non-union distributors and to maintain a welfare fund for the benefit of the distributors to which the manufacturers made payments (F. 5, 6, 55).

The original agreement between the union and the manufacturers was entered into in 1949 and fixed a minimum discount of five cents per pound (F. 52; Tr. 260–262, 819–820, 1040–1042; Pl. Ex. 261). This minimum discount remained in effect until August 1956, when it was raised to eight cents. At that time it also was agreed that the manufacturers would increase the list selling price by five cents per pound (F. 53–54; Tr. 165–167, 271–277, 394, 395, 732–735; Pl. Exs. 243, 261). At the time of the 1949 agreement fixing the minimum discount, it was agreed that the manufacturers would deal only with distributors who were members in good standing of the union (F. 55; Tr. 37–38; 948–949; Pl. Ex. 243). This boycott of non-member distributors was "largely successful" (F. 55; Tr. 672–680, 922–928, 1002–1008). These agreements were negotiated by Morris Horn, who was chief executive officer of Local 627 (F. 4, 52, 53, 54), and were entered into with the knowledge, authorization and ratification of the union (C. 6; Tr. 138–141; 296–298, 723–730).

ARGUMENT

With a single exception discussed below, pp. 10–11, appellant appears not to contest the sufficiency of the evidence upon which the court below found that it had conspired to fix prices and impose boycotts in violation of Section 1 of the Sherman Act. Rather, the principal question sought to be raised by this appeal is whether the union's practices affecting the distributors are exempted from the antitrust laws by the Norris-LaGuardia Act, 29 U.S.C. 101–115, as activities affecting a labor group or a group which

is involved in a labor dispute. Although the so-called labor exemption often presents troublesome questions, the issues raised in the instant case are neither novel nor difficult. Since the court below properly applied settled principles to fully-supported findings of fact, this appeal raises no issue which warrants plenary review by this Court.

1. The activities of a labor union on behalf of the employees it represents are exempt from the antitrust laws when those activities concern bargaining in pursuit of its members' interest in such subjects as their wages, hours and working conditions. Even though such activities may result in competitive restraints in product markets, the national labor policy as expressed by Congress in Section 6 of the Clayton Act, 15 U.S.C. 17, and in the Norris-LaGuardia Act, requires antitrust exemption. *E.g., Local 189, Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676. In addition, a union may properly organize and bargain on behalf of non-employee groups if such activity is necessary to protect the legitimate economic interests of employees. See *American Federation of Musicians* v. *Carroll*, 391 U.S. 99; *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91. Absent such a legitimate labor objective, however, a combination or conspiracy between a union and a nonlabor group to restrain trade in a product market violates the Sherman Act. See *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94; *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797. That this case lies squarely within the latter category is amply demonstrated on the record.

Although appellant argues (J.S. 5–6) that the distributors were "employees" or "workingmen" and organizable as such for purposes of collective bargaining, the court below properly held, on the basis of detailed findings, that they were independent businessmen. J.S. 18a–19a; F. 21–43. As noted *supra*, pp. 3–4, the distributors owned their trucks, operated as self-employed individuals, partnerships or corporations, purchased for resale the products of the manufacturers, established the prices and conditions for resale, assumed the risk of bad-debt losses, and determined their own hours and conditions of work. Thus, they met the usual tests for independent contractors. Cf. *Taylor* v. *Local No. 7, International Union of Journeymen Horseshoers*, 353 F. 2d 593 (C.A. 4), certiorari denied, 384 U.S. 969.

Of course the cases cited above make clear, and the court below fully recognized (J.S. 19a), that this determination is not necessarily decisive of the antitrust issues, for a union may, in certain circumstances, have a legitimate interest in organizing independent businessmen and bargaining on their behalf. The test for immunizing from the antitrust laws union activities on behalf of non-employee groups, such as these distributors, is whether there is "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." *American Federation of Musicians* v. *Carroll, supra*, at 106, quoting with approval the statement by Judge Levet (who also decided this case) at 241 F. Supp. 865, 887. If such economic

interdependence exists, the union may have a legitimate interest in fixing the compensation received by the independent businessmen for their services in order to protect employee-members' job opportunities and wage levels. See *Local 24, Teamsters Union* v. *Oliver, supra.* In the absence of such economic interdependence, however, independent businessmen may not form an association to maintain the prices of the products they distribute or otherwise to restrain competition. See *Los Angeles Meat and Provision Drivers Union* v. *United States, supra.*

Here, the district court explicitly found that "there was no legitimate labor objective served through the membership of the distributors in Local 627" (F. 51). The activities of the distributors before they joined the union "had no adverse effect upon the wages and working conditions of [the manufacturers'] employee-drivers, [and] in [no] way represented an attempt to evade the union wage scales of such employees" (F. 46). Following the inclusion of the distributors in Local 627, the manufacturers did not attempt to "play off" the employee-drivers against the independent distributors or in any other way to lower or otherwise affect the wages or other working conditions of the employees (F. 49).[3]

[3] Appellant argues (J.S. 3, 9) that the district court improperly excluded certain evidence showing actual and attempted conversions by other manufacturers of employee-drivers into owner-drivers, which evidence would have shown a valid justification for the union's activities. Since the decree in this case is addressed only to relations between appellant and the defendant manufacturers and their distributors, the relevance of any such evidence is not apparent. In any event, the appellant fails to indicate what evidence it wanted to introduce on this sub-

The conclusion that the activities of the appellant on behalf of the distributors did not serve any legitimate labor objective, and were not in furtherance of any interest of its employee members, is underlined by the fact that the employee-drivers of the defendant manufacturers do not belong to the appellant union but rather to the Teamsters (F. 18, 19). Local 627 does include in its membership employee-drivers of producers of processed meats other than the defendant manufacturers, but despite some occasional competition between these manufacturers and the distributors (F. 47), there is no indication that any economic interrelationship existed between the distributors and employee-members of Local 627. Indeed the union did not even seek to organize the distributors; it was the distributors who saw an advantage in union membership as a means of enhancing and protecting their own profits, and thus sought to join

---

ject which the district court excluded. The appellant did introduce testimony of Gori Carfora that Sabrett had threatened to convert drivers into distributors (Tr. 1330–1334), testimony of Morris Horn that distributors were used to service house accounts during a 1935 strike (Tr. 1432–1439), testimony of John Lexis that he had been an employee of Olympia before becoming a distributor (Tr. 329–330), testimony concerning comparative cost studies on the use of distributors as against the use of employee-drivers made by Superior (Tr. 1096–1104, 1114–1115), and testimony designed to show the degree of competition between Sabrett and manufacturers whose employee-drivers are represented by Local 627 (Tr. 1240, 1327–1328). All of this testimony was introduced subject to the government's motions to strike. In a memorandum dated February 27, 1968 (reprinted herein as Appendix B, *infra*), the district court denied the motions to strike and accepted all of the appellant's evidence, noting an intention to consider and evaluate it in preparing the findings of fact.

the union without prior solicitation (F. 44). Plainly this is not a case like *Carroll, supra,* in which a union has sought to organize and regulate the compensation of independent businessmen in order to preserve wage scales and job opportunities of its own members. What is involved here is a transparent attempt by independent businessmen to use the cloak of union membership to insulate concerted activities in restraint of trade from the sanctions of the antitrust laws. See *Los Angeles Meat Drivers Union* v. *United States, supra* at 102–103; *Columbia River Packers Assn.* v. *Hinton,* 315 U.S. 143, 147. Participation by a union in such a scheme, which imposes direct restraints on a product market for the sole benefit of nonlabor interests, is entitled to no exemption from the normal operation of the antitrust laws.

2. Appellant challenges (J.S. 4, 9–10) the sufficiency of the evidence to support the finding that the appellant conspired with the manufacturers in 1956 to raise the list price of frankfurters (F. 54).[4] The primary evidence on this point was the deposition testimony of the president of Olympia, who died before trial but who was subject to cross-examination by the appellant at the deposition (Pl. Ex. 261, pp. 48–60). There was, however, additional support for this finding. See the

[4] Even assuming, *arguendo*, a legitimate interest on the part of appellant union in bargaining on behalf of the distributors for their wages, hours and working conditions, such an interest could not exempt from antitrust sanction an agreement between the union and the manufacturers to fix the retail price. See *Local 189, Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (opinion of Mr. Justice White), 732-733 (opinion of Mr. Justice Goldberg). Presumably for this reason appellant apparently does not here rely on the labor exemption.

testimony of Gregory Papalexis, Tr. 891–898, relevant portions of which are quoted in the district court's Memorandum on Evidentiary Questions and Supplemental Memorandum, App. B herein at pp. 15–18, 21. See, also, Tr. 277–279, 719–736, 808–809, 819–820, 905–910; Pl. Ex. 4, 16, 17, 24. Certainly this finding is not clearly erroneous. Rule 52(a), F. R. Civ. P.; see *International Boxing Club* v. *United States,* 358 U.S. 242.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Assistant Attorney General.

GREGORY B. HOVENDON,
SEYMOUR H. DUSSMAN,
Attorneys.

JANUARY 1969.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

62 Civil 2031, Memorandum

UNITED STATES OF AMERICA, PLAINTIFF

v.

OLYMPIA PROVISION & BAKING CO., INC. AND PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, DEFENDANTS

LEVET, *District Judge:* Defendant Local 627 above mentioned moves for reargument of a decision by this court dated and filed April 5, 1968, and for a judgment dismissing the complaint against said defendant.

This defendant bases the motion upon a decision of the United States Supreme Court in *American Federation of Musicians of The United States and Canada et al* v. *Joseph Carroll et al.*, etc., filed May 20, 1968, U.S. Law Week May 21, 1968, p. 4441.

Defendant Local 627 points out that the Supreme Court in the decision just mentioned affirmed this district court in the dismissal of a treble damage private antitrust suit against a union, American Federation of Musicians. Local 627 contends that this court should have dismissed this suit against Local 627, an action involving not music or musicians but frankfurters, on the rationale the *Carroll* decision.

The mere fact that in one case I decided the issues in favor of a union and in another case decided the issues against another union is of no relevance. In the Musicians case I found a legitimate labor object in the challenged labor agreements and the United States Supreme Court recognized this, U.S. Law Week, *supra,* pp. 4441, 4442, 4443, while in the present case, 282 F. Supp. 819, 825, this court found that "The proof is clear that there was no legitimate labor objective served through membership of the distributors in Local 627." (Finding 51)

The facts of this case are neither similar nor equivalent to those in the Musicians cases. I have reviewed the objections to specific findings and I conclude that none of these objections has merit.

Motion to reargue granted; and after such argument, the motion is in all respects denied.

So ordered.

Dated: New York, N.Y., September 17, 1968.

RICHARD H. LEVET,
United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

---

62 Civil 2031, Memorandum on Evidentiary Questions Raised at Trial

UNITED STATES OF AMERICA, PLAINTIFF

v.

OLYMPIA PROVISION & BAKING CO., INC. AND PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DEFENDANTS

I.

LEVET, *District Judge:* On pages 889 through 900 an offer of proof was made with respect to testimony of one Gregory Papalexis. The offer of proof from this source was taken by the court subject to a ruling. Objections were made by defendant Local 627 that the testimony was hearsay. The government presses the acceptance of such testimony on the ground of co-conspirator's testimony, statements, etc. made during and in furtherance of the conspiracy.

I have reviewed this testimony and I conclude that it is admissible. The objections of Local 627 are, therefore, overruled and the relevant portions of the admissible testimony are accepted. See *United States* v. *Annunziato,* 293 F. 2d 373, 378 (2nd Cir.), cert. denied, 368 U.S. 919 (1961); *United States* v. *Im-*

perial Chemical Industries, Ltd., 100 F. Supp. 504. *United States* v. *Birnbaum*, 337 F. 2d 490, 494–495 (2nd Cir. 1964) is not applicable to the present situation.

By reason of objections made and sustained during the course of the offer made by counsel for the plaintiff, it is hereby stated that the portions of the testimony of Gregory Papalexis contained in the said offer, which are admitted, are as follows:

"By Mr. HARRIS:

Q. Mr. Papalexis, would you tell us in substance now what your father said to you in August of 1956 just prior to August 27th?

A. My father told me that he had attended a meeting at Mr. Horn's office where Mr. Gilman and Mr. Frankel—Ferdinand Frankel—was present. And I believe he also told me that Julius Frankel was present, although I am not sure of that.

The COURT. From Sabrett?

The WITNESS. From Sabrett.

A. (continuing) And Mr. Gilman from Superior, and that they had reached an agreement, they had made a deal to raise the price of the frankfurters and rolls, and also to give the distributors a larger commission." (pp. 891–892)

"The COURT. * * *

Do you recall your father saying anything about anybody else being there? If you do, tell us what was said. If you don't recall, just say 'I don't recall.'

The WITNESS. Your Honor, he told me that he went to Mr. Horn's office and he had met there with Mr. Frankel and Mr. Gilman and I also believe he mentioned the younger Frankel's name, and they made a deal to raise the price of frankfurters and rolls and to also give the distributors a higher commission." (pp. 893–894)

"By Mr. HARRIS: * * *

Q. Let me show you this Exhibit 4 for identification. Will you look at it?

A. Yes.

Q. Does that refresh your recollection as to whether your father described anything else that was said at this meeting that he told you about?

Just say yes or no if it does.

A. Yes. Yes, it does.

Q. Now with your recollection refreshed, can you tell us what else he said that had been said at the meeting that he described to you?

A. He said that this was the prices that they had agreed on at that meeting.

Q. That was?

By the COURT:

Q. That what was?

A. This listing right here of prices is what they had agreed to.

Q. Oh Exhibit——

Mr. HARRIS. 4 in evidence

Q.—4 in evidence. All right.

A. These were the prices that they had agreed to.

The COURT. All right.

A. (Continuing) To publish to the trade.

By Mr. HARRIS:

Q. Now did your father tell you to do anything on this occasion?

A. Yes, he told me to put these prices into effect and to give the distributors an increased mark-up.

Q. Of what?

A. Well, the price went from 55 cents a pound to 60 cents a pound.

* * * * *

The COURT. You are speaking of the list price?

The WITNESS. The list price and the distributors' commission went from five cents a pound to eights cents a pound on frankfurters, and the

rolls went to five cents a dozen from a price of four and a fraction.

I think that's what their price was before." (pp. 896–898)

E.

PLAINTIFF'S MOTIONS TO STRIKE

I

Plaintiff's motion to strike Exhibits 108 and 109, which were photographs of a truck of one of the Sabrett distributors, Benjamin Goodman, and of a Sabrett house truck (780–782) is hereby denied.

II

Plaintiff's motion (1119, 1563) to strike the testimony of Staub concerning the studies made by Superior on the comparative cost to the company of direct delivery through house drivers and indirect delivery through distributors (1096–1104, 1114–1115) is denied. This is without present indication of the weight and applicability of such evidence or materiality thereof. The court will subsequently determine these and any other pertinent questions in reference thereto.

III

Plaintiff's motion (1564) to strike the testimony of Staub with reference to sales made by Superior to certain customers (1083–1093) is denied.

IV

Motions made by plaintiff (1564) to strike the testimony of Julius Frankel with respect to competition between Sabrett and firms such as Hygrade, whose employee-drivers are represented by Local 627 (1240), and a similar motion with respect to testimony of

Gori Carfora on the same general subject (1327–1328), are denied.

V

Plaintiff's motion (1564) to strike DU Ex. 111, prepared by Sabrett, showing losses of customers to such firms as Hygrade and Anderson & Tarlow and acquisitions of customers from said processors which employ Local 627 drivers, is denied.

VI

Plaintiff's motion (1566, 1331, 1333) to strike the testimony of Gori Carfora, to the effect that during collective bargaining agreements between Sabrett and the union which represented Sabrett house drivers, Sabrett threatened to convert drivers into distributors (1330–1334) is denied.

VII

Plaintiff's motion (1565) to strike Horn's testimony, that in a 1935 strike by Local 627 employees against manufacturers of frankfurters in the Metropolitan District, distributors were used to service the house accounts of such striking Local 627 salesmen (1432–1439), is denied.

VIII

Plaintiff's motion (1472, 1565) to strike all union agreements introduced (Deft. Ex. DU 3, DU 4, DU 36, DU 45, DU 79, p. 1469) which contained distribution discount or differential provisions similar to those negotiated in the late 1940s with Sabrett, Superior and Olympia, is denied.

IX

Plaintiff's motion (1566) to strike the testimony of John Alexis, to the effect that before he became a distributor he had worked as a chauffeur for Olympia (329, 330), is denied.

DEFENDANT'S MOTIONS TO STRIKE

I

Defendant's motion (1568) to strike testimony that distributors took certain deductions in their tax returns (62, 188), is denied.

II

Any motion (1568, 159) by defendant to strike any pretrial admissions or trial testimony with respect to contributions or payments by manufacturers on behalf of distributors to Local 627 Welfare Fund is denied.

III

Defendant's motions (1000, 1006, 1013) to strike the testimony of Costa, are denied (997–1014).

IV

Motion of defendant (1121) to strike the testimony of Harry Staub (1053–1056) with respect to an incident occurring in 1956 at the office of the union involving a dispute over a customer is granted (1074–1075).

So ordered.

Dated: New York, N.Y., February 27, 1968.

/s/ RICHARD H. LEVET,
United States District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

62 Civil 2031, Amendment to Memorandum on Evidentiary Question Raised at Trial

UNITED STATES OF AMERICA, PLAINTIFF

v.

OLYMPIA PROVISION & BAKING CO., INC. AND PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, DEFENDANTS

LEVET, *District Judge:* Since rendition of my original memorandum dated February 27, 1968, my attention has been called to certain testimony on pages 961 and 962 which related to an offer by plaintiff in respect to the testimony of Gregory Papalexis. I have examined these pages and I direct that my memorandum of February 27, 1968 be amended by the insertion of the following between pages 4 and 5 thereof:

> "Q. [By Mr. Harris] Do you recall now whether or not your father on the occasion of the conversation which you testified to this morning made any further statements with reference to anything said or individuals present?
>
> "A. [By Mr. Gregory Papalexis] Well, in line with this statement there——
>
> "The COURT. Had what?
>
> "A. That Mr. Horn had fought for the difference in the commission, to increase the amount of commission to the distributors." (pp. 961–962)

So ordered.

Dated: New York, N.Y., March 7, 1968.

RICHARD H. LEVET,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
RFME COURT U. S.

Office-Supreme Court, U.S.
FILED
JAN 23 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant
501 Fifth Avenue
New York, N. Y.

WALDMAN & WALDMAN
Of Counsel

INDEX

PAGE

Preliminary Statement 1

The Facts 2

The Economic Functions of the Owner-Drivers and the Extent of Company Control 3

The Economic Interrelationship Between the Owner-Drivers and Unionized House Drivers 5

ARGUMENT

POINT I—

Whether the owner-drivers possess sufficient employee characteristics to permit collective bargaining in their own interest is a substantial issue meriting full consideration by this Court 9

POINT II—

The economic interrelationship between owner-drivers and unionized house drivers furnishes a legitimate union objective for the collective bargaining provisions found illegal below 12

POINT III—

The evidence does not establish the union's participation in any conspiracy to fix manufacturers' prices to the retail trade 20

CONCLUSION 22

Appendix "A" 1a

TABLE OF AUTHORITIES

Cases: PAGE

Aetna Freight Lines, Inc. v. Clayton, 228 F.2d 384, cert. den'd 351 U.S. 950 16
American Federation of Musicians v. Carroll, 391 U.S. 99 ..... 12n, 16, 17, 18
Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-504 17

Bakery Drivers Union, Local 802 v. Wohl, 315 U.S. 760 ..... 7n

Cleaver v. United States, 238 F.2d 766, 771 21

Dennis v. United States, 302 F.2d 5 21

Local 24, Teamsters Union v. Oliver, 358 U.S. 283 ..... 12n, 16, 18
Los Angeles Meat Drivers Union v. United States, 371 U.S. 94, 105 ..... 10, 19

Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc. 14, 16, 19
Mine Workers v. Pennington, 381 U.S. 657, 666 17

NLRB v. Hearst Publications, 322 U.S. 111 11

Patterson v. United States, 222 Fed. 599, 631, cert. den'd 238 U.S. 635 21

United States v. Bentvena, 319 F.2d 916, 949, cert. den'd 375 U.S. 940 21
United States v. DiRe, 332 U.S. 581 21
United States v. Direct Sales Co., 40 F.Supp. 917, aff'd 319 U.S. 703, 713 21
United States v. Hutcheson, 312 U.S. 219 10

PAGE

United States v. Russano, 257 F.2d 712, 713 21
United States v. Webb, 359 F.2d 558, 562, cert. den'd 385 U.S. 824 24

Other Authorities:

29 U.S.C. §§ 158(b)(4) and (b)(7) NLRA §§ 8(b)(4) and 8(b)(7) 8n

42 U.S.C. § 410 Federal Social Security Act 9

Hearings before Committee on Ways and Means, House of Representatives, 81st Cong., 1st Sess., on H.R. 2893 ..... 10, 1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Preliminary Statement

Appellant (hereinafter sometimes referred to as "Local 627" or "the Union") opposes the motion to affirm and urges that there are substantial issues warranting plenary appellate review by this Court, the only review which the Union can receive in any forum under the direct appeal provisions of the antitrust laws. In the words of Rule 16(1)(c), it is not "manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

If this Court believes, however, that plenary review is unwarranted, we respectfully urge that the judgment below be summarily reversed as clearly erroneous.

The Facts

Contrary to the government's assertions, appellant does not accept either the sufficiency of the evidence to support the district court's findings or the sufficiency of the findings to support the conclusions and ultimate judgment. This, we believe, is clear from the Jurisdictional Statement which casts the issues in factual terms quite different from those embodied either in the findings below or the government's motion to affirm. For example, question No. 3 (J.S. 3)[1] is framed in terms of the owner-drivers' "job and wage competition with admitted employee drivers". The government argues that no such competition exists and that the district court's finding that there was "no legitimate labor objective served through the membership of the distributors in Local 627" (F. 51) is equivalent to a finding of the lack of requisite economic interrelationship. Plainly the existence or non-existence of such economic interrelationship is squarely at issue on this appeal.

It is noteworthy that the three findings on which the government primarily relies (F. 46, 49, 51; see motion p. 8) are the only material findings made below which are not cited at all to the trial record. An examination of the voluminous proposed findings submitted by the government to the district court will also disclose that these three findings were not proposed by plaintiff.[2]

---

[1] The references herein to J.S., "F", and "Tr" have the same meaning as in the government's motion. In the case of many findings, the trial court's accompanying citations to the trial record disclose a fuller and more helpful exposition of the pertinent facts than the findings themselves.

[2] The proposed findings were expressly referred to in the opinion below (J.S. 3a) and are a part of the record transmitted to this Court. We recognize that a trial court is not limited to the proposed findings submitted by the parties, but the fact that each of the most crucial findings herein was not included in the extensive, well-cited findings proposed by government counsel is not without significance.

The Economic Functions of the Owner-Drivers and the Extent of Company Control.

The government's motion gives only a partial statement of the pertinent facts. Thus, the Sabrett, Superior and Olympia owner-drivers serviced not only "their own customers", but also house accounts, which were assigned to them by the company and often transferred from a house driver's route to that of an owner-driver. The owner-driver had no say as to the terms of sale or credit to these house accounts and was paid by the manufacturer for servicing them, either through commission or flat salary (F. 24). Even the owner-drivers' "own accounts" were often solicited by the company, which assigned new customers either to a house driver, as a house account, or to an owner-driver, as "his own account" (F. 48).

Sabrett, the largest of the three manufacturers and the only one still in business, actively supervised the lay-out and operation of the owner-drivers' routes, received and processed customer complaints as to the promptness of the owner-driver's deliveries, and re-assigned accounts which the owner-driver did not satisfactorily service (Tr. 702-703, 755, 821, 1307-1317, 1350). In substantial measure the solicitation of new customers for owner-drivers and the defense against competitive assaults on their existing customers was undertaken and performed by Sabrett sales personnel; and, to a somewhat lesser degree, the same was true of Superior and Olympia (Tr. 372-373, 520, 750, 752-755, 759, 794, 906-907, 977-978, 1076-1077, 1319-1323).

The government asserts (motion p. 3) that the owner-drivers set their own terms and conditions of sale to their own customers. But this power was more illusory than real. The uncontradicted evidence shows that the list price promulgated by the manufacturer to its own retail trade in the New York area set the effective maximum which the

owner-driver could charge to his customers, who were located in the very same metropolitan area (Tr. 66, 68-69, 71, 183, 230-231, 348-349, 519, 759).[3] With respect to hours of work, the evidence shows that the working day of both house drivers and owner-drivers was wholly determined by the needs of their customers, for early morning delivery in the case of street peddlers, and for pre-luncheon delivery in the case of other customers. Both house drivers and owner-drivers started work between midnight and 4:00 A. M. and finished deliveries by late morning or afternoon (F. 39; Tr. 58-59, 80, 231-235, 332, 338-339, 706-707, 748, 797, 1398-1399; DU Ex. 116, pp. 7-9). Indeed, there is no dispute that the actual work performed by the two groups was identical, from the initial, daily pick-up at the manufacturer's plant, through the delivery process, and ending with the last stop along a prescribed daily route (F. 16; F. 21).

Each of the three companies permitted the owner-drivers to return unsold merchandise for credit, at the end of the day or week, so that the risk of inability to sell remained that of the manufacturer. Some owner-drivers with refrigerated trucks chose to keep their unsold merchandise overnight so as to avoid a return trip to the plant, and house drivers with refrigerated trucks did the very same thing (F. 41; Tr. 1395, 1419-1420).

The owner-drivers neither manufactured, stored nor warehoused any product. Their sole economic function was to pick up frankfurters and rolls each morning and deliver them daily from the processor's plant to the customers on their route.

Many of these facts, and others demonstrating an employer-employee relationship for Sherman Act purposes

[3] We think it fair to state that there is no material contradiction or dispute in the trial record as to the facts pertinent to this appeal.

are set forth in the findings below (E.g. F. 24, 25, 26, 27, 28, 29, 41, 48). On some significant aspects of the relationship, the court simply failed to make any findings, although such findings were proposed by the Union and established by uncontradicted evidence.

Although "distributors" operated as partnerships and corporations, there is no issue in this case as to any man who did not actually drive a truck regularly in the delivery of frankfurters (Tr. 16-18). There was neither evidence nor finding of any attempt to set a minimum discount for any "distributor" who did not drive a truck. The documentary and testimonial evidence established that the term used in the collective agreement was "agent-driver", not "distributor" (Tr. 1450, Pltf. Ex. 3).

The Economic Interrelationship Between the Owner-Drivers and Unionized House Drivers.

The record herein establishes no less than three separate admitted employee-driver groups in "job or wage competition or some other economic interrelationship" with the Sabrett, Superior and Olympia owner-drivers. These are:

1. *The house drivers employed by other frankfurter manufacturers in direct competition with the three corporate defendants.* Throughout the period involved, Sabrett, Superior and Olympia were in intense competition with other provision houses employing Local 627 house drivers (Tr. 181, 355-356, 409, 714, 978-979, 1090-1093, 1145-1146, 1222-1249, 1297-1304, 1325-1327, 1390, 1476-1479, DU Exs. 111, 112 and 113). Indeed, Sabrett's sales manager described Hygrade Food Products Corp., an employer of approximately eighty Local 627 drivers, as Sabrett's principal competitor in the sale of frankfurters (Tr. 1325, 1476-1477).

The differential or discount accorded owner-drivers from the manufacturer's list price represents the manufacturer's cost of delivering his product from plant to retailer. For example, a discount of 2¢ per pound from the price at which the processor is prepared to sell (and deliver through house drivers) to his own retail trade means that he has accomplished the delivery of his product through owner-drivers at a cost of only 2¢. To the extent that Sabrett, Superior and Olympia were free to compress the discount to their owner-drivers and thus reduce their distribution costs below those of competitors employing Local 627 house drivers, the defendant corporations enjoyed the competitive advantage of lower labor costs. And since the commission earnings of the Local 627 drivers depended on the volume of sales made by them, Sabrett's ability to cut its distribution costs and thus its ultimate retail price directly threatened the earning capacity of Hygrade's house drivers.[4] Moreover, the job security of Hygrade's drivers was also jeopardized, for Hygrade would naturally seek to regain competitive parity in labor costs by either reducing the drivers' wage scale or converting to a predominantly owner-driver form of distribution.[5]

---

[4] For purposes of simplicity, this brief will refer to Sabrett as prototype of the three corporate defendants, and Hygrade, as prototype of competing frankfurter manufacturers employing Local 627 drivers. The same relationship existed between the other two corporate defendants and many other provision houses.

[5] By negotiating a minimum owner-driver discount in 1949 and a further increase in 1956 to keep pace with driver wage increases, Local 627 obviously forstalled some of these dangers, although as indicated in the Jurisdictional Statement and this brief, many competitors of the corporate defendants did in fact convert house drivers into owner-drivers, particularly in the period prior to 1949, and proof to this effect was erroneously excluded below. The significant point is that the economic interrelationship and the threat to employee standards is clear, and a union need not delay its response until all the abuses have already occurred.

2. *The house drivers of Sabrett, Superior and Olympia.* The owner-drivers of each of the three companies competed for customers with the house drivers of the other two (F. 47). In the face of a low owner-drivers' discount by one company, the other two would naturally seek to remain competitive by lowering their own distribution costs, either through reducing the wages of their house drivers or by converting them to owner-drivers.

This is precisely what occurred. Sabrett regularly countered its drivers' wage demands with the threat to convert them into owner-drivers (Tr. 1329-1334). Sabrett also rejected its sales manager's recommendation to establish new house routes on the ground that indirect delivery through owner-drivers was cheaper (Tr. 1328-1329). All three companies, aware that their cost accounting surveys showed distribution costs to be lower through owner-drivers than through house drivers, transferred accounts from house drivers to owner-drivers and converted employees into ostensible "independent contractors" (F. 48; Tr. 654-655, 697, 1387-1389).[6]

---

[6] The fact that the house drivers of the corporate defendants were members of another union and not Local 627 is irrelevant. Nothing in the findings or opinion below indicates that the district judge gave any weight to this point, and his comments during trial show that he did not (Tr. 1106). Local 627 represented house drivers and owner-drivers in the provision industry, and the Teamsters locals represented both groups in the baked goods industry. In fact the right of Teamsters Local 802 to unionize and regulate owner-drivers has been upheld by this Court. *Bakery Drivers Union, Local 802* v. *Wohl*, 315 U.S. 760. The three corporate defendants, as producers of frankfurters and rolls, were hybrids and, therefore natural subjects of jurisdictional dispute. The trial court rejected proof that Local 627 and the Teamsters agreed that the Teamsters would represent the house drivers and Local 627 the owner-drivers (Tr. 1481-1483). In any event, Local 627 had a legitimate interest in the maintenance of the wage standards and job security of unionized house drivers in the food industry who were themselves represented by a sister union but who competed with processors employing Local 627 drivers. Moreover,

3. *The employee-drivers of distributor corporations.* These drivers, members of Local 627, were employed by the two or three Sabrett, Superior or Olympia corporate distributors and were thus in regular competition with the individual owner-drivers of the other two manufacturers. Their economic interrelationship with the owner-drivers and the impact on them of the owner-drivers' discount is similar to that of the company house drivers considered above.

Morris Horn, chief negotiator for Local 627, testified without contradiction that the purpose of negotiating a minimum agent-driver discount in 1949 was to control the conversion of house drivers into owner-drivers and to protect the house drivers against "economic jeopardy"; and that he so informed the manufacturers (Tr. 1445-1452). He testified further, also without contradiction, that the 5¢ discount was calculated to achieve "a parity or comparable cost of operation for the agent-distributors as the cost of operating as a route salesman" (Tr. 1457); and this, too, was discussed during the negotiations (Tr. 1452-1458).

---

the federal labor laws encourage the peaceful resolution of jurisdictional issues between unions (NLRA §§8(b)(4) and 8(b)(7); 29 U.S.C. §§158(b)(4) and (b)(7)); and it would be inconsistent with this national policy to hold that the representation of the house drivers and owner-drivers of a single employer by two unions leads to a lesser bargaining power under the Sherman Act than would be the case if one union represented both groups. Any such holding would only encourage "all or nothing" jurisdictional warfare.

ARGUMENT

POINT I

Whether the owner-drivers possess sufficient employee characteristics to permit collective bargaining in their own interest is a substantial issue meriting full consideration by this Court.

The Federal Social Security Act defines "employee" as including the following (42 U.S.C. § 410):

"(j) The term "employee" means—

. . . . . .

(3) any individual (other than an individual who is an employee under paragraph (1) or (2) of this subsection) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for his principal;

. . . . . .

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such service (other than in facilities for transportation), or if the services are in the nature of single transaction not part of a continuing relationship with the person for whom the services are performed."

Not only does the reference to "agent-driver . . . distributing meat products" squarely describe the owner-drivers herein, the legislative history shows that Local 627 spearheaded the effort to obtain this inclusion. See testimony of Morris Horn on the Social Security Act Amendments of 1949, Hearings before Committee on Ways and Means, House of Representatives, 81st Cong., 1st Sess., on H.R. 2893, p. 2092, printed as Appendix "A" to this brief.

This Court has held that the scope of the "labor exemption" under the Sherman Act cannot be determined without reference to other federal legislation. *United States* v. *Hutcheson*, 312 U.S. 219. Although the Court has principally spoken of the Clayton Act and Norris-LaGuardia Act in this connection, it would be highly incongruous to ignore the deliberate, carefully-drawn Congressional conferral of employee status upon the very group of workers at issue herein, in an important cognate piece of social legislation.

In discussing the ability of self-employed workingmen to bargain collectively in their own self-interest, apart from economic interrelationship with an admitted employee group, the concurring opinion in *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94, 105 noted:

> "The Court is not here called upon to pass upon, and does not pass upon, the existence of the antitrust violation, or whether as an original matter, the grease peddlers might properly associate among themselves or affiliate with a sympathetic and genuinely interested union to improve their economic condition. Resolution of such issues would require careful and detailed consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by §§6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by United States v. Hutcheson, 312 U.S. 219, and, in addition, the applicability here

of the doctrines enumerated by this Court in cases such as Columbia River Packers Association, Inc. v. Hinton, 315 U.S. 143 and Allen Bradley Co. v. Local No. 3, 325 U.S. 797"

Should this Court decide the question of economic interrelationship with admitted employees against appellant—which we believe most unlikely—than the issue posed above is squarely presented.

The evidence outlined above, and even the district Court's own findings, show a sufficient degree of employer control and lack of true entrepeneural independence on the part of the owner-drivers to entitle them to associate and take concerted action to improve their own earnings. See also *NLRB* v. *Hearst Publications*, 322 U.S. 111. This is particularly so with respect to the owner-drivers of Sabrett, the only corporate defendant still in business.

POINT II

The economic interrelationship between owner-drivers and unionized house drivers furnishes a legitimate union objective for the collective bargaining provisions found illegal below.

The sole basis of the government's motion to affirm is an asserted "absence of economic interdependence" between owner-drivers and house drivers. Implicit in this argument is an admission that were the requisite economic interrelationship to exist, a collective bargaining provision establishing minimum discounts for owner-drivers would be an appropriate means to safeguard the job and wage security of the interrelated house drivers.[7]

The government's argument misconceives both the state of the evidence and the scope of this Court's decisions on the economic interrelationship that will justify union action. Moreover, the findings below, even if fully supported by evidence, would not justify the conclusion that Local 627 had "no legitimate labor objective".

---

[7] The government implicitly concedes, as it must after *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, that the owner-driver discount is in reality a regulation of wages not prices, although this was the main issue presented below. The principal ingredient in the discount is the labor cost of the owner-driver—the discount representing his only compensation for the physical services performed—with the cost of the truck being only a relatively minor factor. Moreover, unlike the agreement in *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, in which the truck rental price approved by this Court was prescribed separately from the cost of the owner-operator's own services, here a single discount covers both the labor and truck costs. And unlike *Carroll*, there is no question here as to independent contractors who do not themselves perform the same type of physical work as employees, that being the only issue which divided the Court in *Carroll*. Finally, there is no contention, evidence, or finding that the contractual discount figure was set so high as to include entrepreneural profit, and Mr. Horn's uncontradicted testimony as to how the figure was determined establishes that it was not (Tr. 1457-1458).

1. Significantly the trial court neither found nor concluded that there was no "job or wage competition or other economic interrelationship" between the owner-drivers and admitted employee-drivers. Indeed, the court found that the owner-drivers did service house account customers, did compete with manufacturers employing Local 627 house drivers, and did receive routes and customer accounts from their manufacturers who also employed house-drivers as an alternative means of distribution. (F. 15, 24, 27, 48). This, we submit, is more than enough to establish economic interrelationship with the house drivers of the three corporate defendants and other competing provision manufacturers.

As indicated above, the district court failed to find other facts, fully established by uncontradicted evidence, which further demonstrated the extent of this interrelationship. Some, but by no means all,[8] of this evidence is mentioned in footnote 3 of the government's motion (p. 9).

In addition, the court below erroneously excluded evidence that prior to the negotiation of the first owner-driver discount in 1949, a large number of frankfurter manufacturers in competition with the corporate defendants had converted their house-drivers into owner-drivers in order to save labor costs. Although the government motion (pp. 7-8, footnote 3) professes ignorance of the evidence which the Union sought to introduce, the offer of proof at trial was quite clear (Tr. 1424-1431).

The government's further argument that evidence of conversions by competing manufacturers is irrelevant will not stand analysis. The Union introduced in evidence a large

---

[8] For example, Frank Goodman testified that Superior converted him from house driver to owner-driver and not only permitted him to keep his former route but also turned over to him a route formerly serviced by another house driver, who was thereupon fired by the company (Tr. 1387-1389).

number of contemporaneous collective agreements with other New York frankfurter manufacturers containing similar "agent-driver discount" provisions, and showing that Sabrett, Superior, and Olympia were not treated in isolation (DU Exs. 3, 4, 36, 45 and 79). It cannot be contended that if 47 out of 50 competing manufacturers convert house drivers into owner-drivers, the Union may not then act to induce the remaining three to refrain from a similar course. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91. And if the Union is then called to account for its action with respect to these three, its experience with the other 47 competitors is certainly relevant to show the justification for its action and the legitimacy of its objective. That was essentially the situation here; and the evidence of the industry-wide situation faced by the Union was highly relevant and erroneously excluded.

2. The key findings below are not only unsubstantiated, they do not, in any event, support the conclusion of lack of economic interrelationship or legitimate union objective. The court found that in 1946 the owner-drivers sought union membership to attain larger profits, they were not then solicited by the union, and they were not then affecting the welfare of other union members. (F. 44, F. 45, F. 46). Apart from the lack of factual support for these findings,[9] they are entirely irrelevant. For Local 627 did not negotiate the first agent-driver discount

[9] The evidence shows without contradiction, that the owner-drivers joined the Union not for higher profits, but to obtain the benefits of Local 627's welfare program and because their unionized retail customers insisted on delivery through a union driver (Tr. 131-132, 141, 250, 574, 650, 673, 704, 720-721, 749, 821, 860-862, 1480). While Local 627 did not then represent any other Sabrett, Superior, or Olympia agent-drivers, it did represent owner-drivers employed by various provision houses which manufactured and sold frankfurters in competition with the corporate defendants (Tr. 581, 583).

until 1949, three years later (F. 52). In 1946 OPA price and wage regulations were still in effect, and these regulations, apart from any economic competition from owner-drivers, prevented any upward push in house driver wages. By 1949 the OPA restrictions had been lifted. And there is neither evidence nor finding that in 1949 the union was unconcerned about the agent-drivers or that in 1949 they did not represent a threat to the economic interests of unionized house drivers.

In emphasizing the finding that in 1946 the union did not organize the owner-drivers or solicit them into membership (motion pp. 9-10), the government, too, overlooks the crucial sequence of dates. For the trial judge found that by 1949—when the challenged discount provisions were first negotiated—Local 627 successfully sought to have all owner-drivers become union members (F. 55). Indeed, this effort was one of the two types of conduct enjoined below (J.S. 27a).

Finally, the government relies on the finding that the manufacturers did not attempt "to set their employee-drivers and distributors against one another for the purpose of affecting the wages or working conditions of either group" (F. 49). Factually, this finding is incredible in light of the uncontradicted testimony of Sabrett's sales manager that the company regularly used the threat to turn over all deliveries to owner-drivers as a club to keep down the wages of its house drivers (Tr. 1330-1334) or the testimony of owner-driver Frank Goodman that a Superior house route was turned over to him and the house driver fired (Tr. 1387-1389). Indeed, this finding cannot be reconciled with the Court's own finding that the three companies did turn over house routes and house accounts to owner-drivers for servicing (F. 48), a step

which inevitably affected the earnings and job security of the house drivers who had previously serviced these routes and accounts.[10]

Moreover, the government's reliance on this finding, as well as other contentions in its motion, betrays an inadequate appreciation of the scope of this Court's decisions in *Oliver, supra; Carroll, supra; Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc., supra,* and similar cases. For Finding No. 49, even if supported, does not deal at all with the interrelationship between Sabrett's discount to its owner-drivers and the wages and job security of Local 627 house drivers employed by competing processors like Hygrade. Even if Sabrett had no house drivers of its own, such an interrelationship would justify the challenged contract provision. *Aetna Freight Lines, Inc.* v. *Clayton,* 228 F. 2d 384, *cert. den'd* 351 U.S. 950. The Court below made no findings as to the nonexistence of such an interrelationship; and none could be made in light of the overwhelming evidence establishing its existence.

The government seems to argue that the relevant interrelationship between Sabrett and Hygrade could rest only on direct customer competition between a Sabrett owner-driver and a Hygrade house driver. Although the trial

---

[10] Equally puzzling is the latter part of Finding No. 50, uncited to the record and not proposed by the government, that the "wage increases [to Sabrett, Superior and Olympia house drivers] were not related in any manner whatever to the activities of Local 627 on behalf of the distributors." Since Local 627 successfully maintained minimum discounts in its collective agreements with these manufacturers from 1949 on, how could the trial court, or anyone else, know what would have happened to house driver wage increases or house driver routes had the companies been free to lower at will the owner-driver discount and thus widen further the known disparity between the costs of indirect and direct delivery?

court found that such competition did exist (F. 47), the decisions of this Court cannot, in any event, be so narrowly read.

The government does not dispute that a low owner-driver discount means lower distribution costs to the manufacturer, as compared to direct delivery through house employees. The economic effects of these diminished costs are not limited to the direct competition between Sabrett owner-driver and Hygrade house driver. For savings effected by Sabrett on this branch of its business could then be utilized to reduce retail prices on its house account business, particularly with very large customers, like Nathan's Famous Frankfurters, where competition is most keen and a slight price reduction might prove decisive. (Tr. 1145-1146, 1224-1232, 1296-1305, 1237; DU Exs. 112 and 113). The acquisition of such customers by Sabrett would substantially impair the commission earnings of the Hygrade house drivers and directly jeopardize Hygrade's ability to support the continued employment of these drivers.

In its *Carroll* decision, quoting from *Mine Workers* v. *Pennington*, 381, U.S. 657, 666, the Court said (391 U.S. at 106):

> "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such activity may be to eliminate competition based on differences in such standards."

In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504, the Court held that the

> ". . . elimination of price competition based on differences in labor standards is the objective of any

national labor organization, but this effect on competition is not considered to be a violation of the antitrust laws."

This settled principle fully justifies the interest of Local 627 house drivers in a contract provision between their union and competing manufacturers which eliminates potential price inequities based on the difference in labor costs of owner-driver delivery and house driver delivery. The direct competition for customers between the two groups only emphasizes the closeness of the interrelationship.

3. The decision below may be read as holding that even if the requisite economic interrelationship existed, Local 627's "objective" did not fall within the labor exemption because the Union was motivated by a desire to further the interest of the owner-drivers not the house drivers. The government motion to affirm apparently does not seek to defend the decision below on any such basis. In any event, the *Carroll* decision poses an objective not a subjective test (391 U.S. at 108): "The critical inquiry is whether the price floors in actuality operate to protect the wages of the sub-leader and sidemen." To permit a district judge to nullify the labor exemption on the basis of the union's purported subjective motivation, notwithstanding the existence of job and wage competition between independent contractors and unionized employees and a bargaining provision reasonably calculated to protect employee wage standards, would be to cut the heart out of the *Oliver* and *Carroll* doctrine and reintroduce the abuses which led to the enactment of the Clayton and Norris-LaGuardia Acts. Particularly is this so since virtually all union efforts to bring independent contractor

standards up to those of interrelated employees incidentally benefit the independent contractor as well.[11]

The instant case points up dramatically the dangers of the subjective approach. At trial, Mr. Horn testified without contradiction that the Union's purpose in 1949 was to protect the interests of house drivers. It is rare that a litigant, charged with lack of concern about interrelationships and interests protected by the "labor exemption", can demonstrate out of the public record that nearly twenty years ago it had such concern. In this case such a demonstration is possible. For in 1949, the very year in question, Mr. Horn testified before a House Committee on proposed Social Security amendments concerning the owner-drivers: Although there was no occasion for him to discuss the question of discounts or differentials or economic interrelationship as such, his testimony, Appendix "A" hereto, discloses the following:

1. Local 627 was aware of, and concerned about, the employers' "process of converting some or all of their regular route salesmen into the hybrid agent-driver bracket." See *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc., supra; Los Angeles Meat Drivers Union* v. *United States, supra.*

2. Local 627 was concerned about the relationship between owner-driver costs and house driver costs, and knew that the owner-driver provided a cheaper form of delivery.

---

[11] The preoccupation in the findings and opinion below with the Union's "objective" in the 1940's also ignores the fact that this 1968 injunction prohibits union action prospectively. There are no findings that the union had no legitimate labor objective in the 1950's or 1960's when the economic interrelationships continued to exist and the challenged contract provisions continued in effect.

3. Local 627 was aware of, and concerned about the effects of the owner-driver system upon "those competing employers who have staunchly assumed their obligations and retained a staff of regular route salesmen alone, instead of taking the easy way out from under a tax burden."

POINT III

The evidence does not establish the union's participation in any conspiracy to fix manufacturers' prices to the retail trade.

Neither the deposition testimony of the deceased president of Olympia nor the hearsay testimony of his son, App. B to the government's motion, supports in any way the finding of Local 627 participation in a price-fixing conspiracy. In substance, both men testified that on a single occasion in 1956 representatives of the three manufacturers came to Mr. Horn's office to negotiate the owner-drivers' discount, that they did negotiate on this subject with Mr. Horn, that Mr. Horn fought hard and successfully for a 3¢ increase in the discount, and that thereafter the three manufacturers' representatives (Papalexis, Gilman and Frankel) agreed upon a common increase in their respective list prices.

There is not a word of testimony that Mr. Horn was a party to the agreement on manufacturers' list prices, that he acquiesced in it, that he said even a single word on the subject, or that this discussion between Papalexis, Gilman and Frankel took place within his hearing or even while he was in the room.[12] The only statements attributed to

[12] The record is replete with testimony of other meetings at Mr. Horn's office in which he was alternately in and out of the room (91-92, 98, 149-150, 212, 256, 258, 265, 321).

Mr. Horn concerned the owners-drivers' discount, a wholly different subject. Nor is there any evidence that Mr. Horn or Local 627 took any subsequent action pursuant to, or in furtherance of, any agreement on manufacturers' list prices.

Finally, there is neither evidence, finding nor contention that on any other of the many occasions on which manufacturers increased list prices over the years, Local 627 displayed any interest or took any part in the decision.

Even if it be assumed, despite the absence of supporting evidence, that this 1956 discussion took place in Mr. Horn's presence and within his hearing, and that he knew that the manufacturers were agreeing to fix prices, that would still not suffice to prove Local 627 participation, absent evidence of actual "words or deeds" on the part of a representative of the Union. *United States* v. *Bentvena*, 319 F. 2d 916, 949, *cert. den'd* 375 U. S. 940; *United States* v. *Russano*, 257 F. 2d 712, 713; *Patterson* v. *United States*, 222 Fed. 599, 631, *cert. den'd* 238 U. S. 635. Participation in a conspiracy cannot be inferred from mere knowledge or acquiescence. *United States* v. *Direct Sales Co.*, 40 F. Supp. 917, *aff'd* 319 U. S. 703, 713, even if the knowledge is acquired through presence at the conspiratorial meetings themselves. *United States* v. *DiRe*, 332 U. S. 581; *United States* v. *Webb*, 359 F. 2d 558, 562, *cert. den'd* 385 U. S. 824; *Dennis* v. *United States*, 302 F. 2d 5; *Cleaver* v. *United States*, 238 F. 2d 766, 771.

CONCLUSION

For all the foregoing reasons, and for those set forth in the Jurisdictional Statement, the motion to affirm should be denied.

Respectfully submitted,

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant
501 Fifth Avenue
New York, N. Y.

WALDMAN & WALDMAN
Of Counsel

APPENDIX "A"

Hearings before Committee on Ways and Means, House of Representatives, 81st Cong., 1st Sess. H.R. 2893, p. 2092

Statement of Morris Horn, Business Manager of Provision Salesmen and Distributors Union, Local 627, Amalgamated Meat Cutters and Butcher Workmen of North America

Mr. HORN. I speak in behalf of thousands of workingmen throughout the country who are suffering gross inequities at the hands of their employers and the Federal Government.

Officially, I speak as business manager of the Provision Salesmen and Distributors Union, local 627, and as special international representative of its parent organization, the Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., whose total membership is more than 200,000 persons.

But the victimized workers whose case I will plead here are of a number extending far beyond the jurisdiction of this or any other single union. They are to be found not only in the provision and meat industries, but in all fields such as processed foods, laundry, milk, bakery, soft and alcoholic beverages—in short, virtually every industry in which delivery is an element.

These men are called agent-drivers. They are employees, yet they are denied all benefits of social security and unemployment compensation. I am here to seek your help in correcting this deplorable condition. Here are the facts:

That classification of agent-driver was invented by employers upon the enactment of the Federal Social Security Act and the various State unemployment insurance laws.

Appendix "A"

It was designed as a clever subterfuge by which employers could avoid payment of Federal and State taxes required under this social legislation. And because of the Government's apparent willingness to condone such a ruse, the plan has worked splendidly.

For employers, the process of converting some or all of their regular route salesmen into the hybrid agent-driver bracket was simply a matter of taking the driver off the pay roll and putting his income solely on a commission basis. Some employers went further and required the driver to purchase his own truck; others did not. In all cases, the new method was to sell merchandise directly to the driver, letting him keep as his commission the difference between that price and the price at which he sold the goods. Most companies kept a small staff of delivery salesmen on a regular basic salary, while at the same time retaining a number of these so-called independent, or agent-drivers.

Defenders of the system might argue that the agent-drivers like it that way. They don't, for as it works out in actual practice, the agent-drivers' earning capacity is no greater—and often a good deal less—than that of salaried salesmen who perform the same duties.

The agent-driver's truck, whether owned by himself or his employer, is usually emblazoned with the company's or the product's name. Having bought merchandise from his boss, who may paint a rosy picture of the huge profits that lie ahead, he finds that, quite logically, the competition of regular drivers has made it impossible for him to earn more than, at the very best, a commission of roughly 6 percent. In the provision industry, he is lucky if he clears $65 at the end of a week's work. The regular driver-salesman, meanwhile, has delivered his merchandise at a flat 3-percent commission, to which is added a basic salary

of some $45. His take-home pay averages $75 a week or better, and conditions in other industries follow the same pattern.

Both men, remember, do exactly the same type of work. Yet, if the regular driver loses his job, he draws unemployment compensation. The agent-driver in similar straits is out of luck, and when the regular driver reaches the age of 65, he collects social-security payments. The agent, ineligible, is out of luck again. Very often he becomes a public charge, dependent upon charities for his very survival.

Every day, more and more salesmen on fixed salaries are being reclassified into this unfair work category. How can they then be called independent businessmen? Does this reclassification make their livelihood any less dependent upon the company whose products they sell? They are employees in every practical sense of the word.

They are, indeed, victimized—by employers who have used them as tools for tax evasion and by a Government that has apparently closed its eyes to their plight.

And the employer who uses this agent-driver delivery system runs a constant risk in that he relinquishes all responsibility for his product upon selling it to the driver. It would seem, then, that from the standpoint of management as well as labor, deliveries by salaried salesmen are necessary as insurance that business will be kept on a sound and healthy basis.

Through the years, various State courts have recognized these men as employees for purposes of collective-bargaining agreements, and a few States, Georgia, for instance, have gone further and included agent laundry drivers under State unemployment compensation laws. (*Brewster* v. *Hewitt,* 69 Ga. App. 593, 26 S. E. (2d) 198), Georgia, I

believe, gives them social-security coverage as well, but in many other States—too many—they are granted no recognition at all.

In some instances, test cases have been made for individual agent-drivers before the social-security agencies, but this has required so much litigation through the various courts, that most of the cases have eventually been dropped by the claimant for lack of funds. Even in the few instances where such a claim has been recognized and the inequity corrected, the ruling has benefited only the individual involved.

Finally, in various decisions—the details of which are stated in a brief to be filed following this testimony—the United States Supreme Court has ruled that agent-drivers are employees. (*Milk Wagon-Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.,* 311 U.S. 91, 98.)

This was also the court's decision in the case regarding newsboys, (*Cronicle Publishing Co.* v. *United States* D. C. U. S., No. Dist. of Calif., 70 Fed. Supp. 666, affd. Per Curiam June 23, 1948), but the Eightieth Congress reversed that stand with the passage of Public Law No. 492, the so-called news venders bill (H. R. 5052), which has denied them social-security coverage.

This law will apply to all agent-drivers unless Congress acts to protect them with specific provisions in the bill which is now before this committee.

In behalf of the members of my own union and the hundreds of thousands of other workers affected by this legislation, I would impress upon you now the vital necessity of correcting a flagrant injustice.

Should the committee decide that agent-drivers are independent businessmen, that decision would be unfair—not only to the workers themselves, but to those competing

employers who have staunchly assumed their obligations and retained a staff of regular route salesmen alone, instead of taking the easy way out from under a tax burden.

I would remind you again, that such a decision would be contrary to a number of rulings by State and Federal courts which have held these men to be—as indeed they are—workers.

This is not a plea for any special privilege. It is an appeal for fairness and simple equity, as opposed to a malignant denial of human rights. It is voiced in the interests of men who dislike being second-class citizens—men with uncertain futures, with wives and children to support, whose economic security hangs in the balance.

I would like, Mr. Chairman, at this time, to add a very brief additional statement.

The CHAIRMAN. You may proceed.

Mr. HORN. At this time I wish to call the committee's attention, if I may, to this fact: that in the extension of benefits in the proposed measure to salesmen, in the general category of salesmen, there should be expressly included agent-drivers and commission-drivers. This would avoid needless and costly litigation for purposes of interpretation by the courts as to what the term "salesmen" was intended to include.

The CHAIRMAN. We thank you very much for your statement, Mr. Horn.

SUPREME COURT, U. S.

FEB 18 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant
501 Fifth Avenue
New York, N. Y.

WALDMAN & WALDMAN
Of Counsel

TABLE OF CONTENTS

PAGE

Reasons for the Grant of Rehearing 1

CONCLUSION 5

Certificate of Counsel 6

TABLE OF CASES

American Federation of Musicians v. *Carroll*, 391 U.S. 99 ..... 2, 3, 4

Local 24, Teamsters Union v. *Oliver*, 358 U.S. 283 ..... 3, 4

Los Angeles Meat Driver Union v. *United States*, 371 U.S. 94 4

Milk Wagon Drivers Union v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 ..... 3, 4

United Mine Workers v. *Pennington*, 381 U.S. 657 ..... 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, appellant hereby petitions for a rehearing of the decision made on January 27, 1969, granting the Government's motion to affirm and affirming the judgment of the district court.

Reasons for the Grant of Rehearing

The Government's motion to affirm was received by appellant's counsel on January 16, 1969. On Thursday, January 23, 1969, our brief in opposition to that motion was received by the Clerk of this Court. The Court's decision was announced on Monday, January 27, 1969.

This chronology suggests strongly that, pursuant to Rule 16, the Court proceeded to decide the case on the basis of the Jurisdictional Statement and motion to affirm without having had the opportunity to consider appellant's

brief in opposition or relate the conflicting arguments advanced in the two briefs to the single copy of the record available to the Court.

Although the Jurisdictional Statement herein sets forth the issues presented, it is difficult in the normal course of events for a Jurisdictional Statement to anticipate and answer the specific arguments which may be made in a subsequent motion to affirm. Here it is particularly difficult because the presentation to the district court was made prior to this Court's decision in *American Federation of Musicians* v. *Carroll*, 391 U. S. 99, and the essential thrust of the Government's presentation below was quite different from its argument in support of the motion to affirm in this Court.

The assertion in the Government's motion that the district court merely "applied settled principles to fully-supported findings of fact" is superficially appealing. It is only upon analysis of both the findings and the uncontradicted trial evidence—an analysis which we could not make in the Jurisdictional Statement but which we believe is persuasively contained in our brief opposing the motion to affirm—that this assertion is shown to be totally unfounded:

1. Although the Court below concluded that the appellant Union had "no legitimate labor objective" (F. 51, C. 3) in negotiating minimum owner-driver discounts and requiring owner-drivers to become union members, this bald conclusion is wholly unsupported either by the Court's own factual findings or by the uncontradicted evidence, both of which establish the contrary. The district court neither found nor concluded that there was no economic interrelationship between owner-drivers and employee drivers, and its factual findings would not support any such conclusion.

2. The district court's conclusion as to the absence of "legitimate labor objective" rests on its findings that in 1946 when the first owner-drivers of the three defendant corporations voluntarily joined the Union, they were not solicited into membership by the Union and they did not then pose a threat to employee wage standards or job security (F. 44-46). The motion to affirm relies on these same findings, which are explicitly limited to the period ending in 1946. But both the district court and the Government overlook the fact—also found by the district court—that the challenged contract provisions were first negotiated a full three years later (F. 52, F. 55); and there is neither finding nor evidence that in 1949 or thereafter the requiste economic interrelationship did not exist or that the owner-drivers did not then represent a threat to employee jobs or standards. Indeed, the district court did find that by 1949—contrary to the situation in 1946—appellant was actively seeking to have owner-drivers become Union members (F. 55).

3. The district court's own factual findings establish an economic interrelationship between owner-drivers and unionized employee drivers sufficient, under this court's decisions, to justify the challenged contract provisions. The court found that the corporate defendants did transfer house routes and house accounts from employee drivers to owner drivers and that the owner-drivers were also in competition with unionized drivers employed by other manufacturers (F. 47, F. 48). In light of these findings, the district court's conclusion that the Union had "no legitimate labor objective" cannot be sustained. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91; *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283; *American Federation of Musicians* v. *Carroll*, 391 U.S. 99.

4. The uncontradicted evidence establishes a job and wage competition between the owner-drivers and three groups of unionized employee drivers more direct, comprehensive and pervasive, than in any case decided by this Court, including *Carroll, Lake Valley* and *Local 24 Teamsters Union* v. *Oliver,* 358 U.S. 283. The nature and scope of this interrelationship is set forth in appellant's brief in opposition to the motion to affirm. Nothing in the district court's findings is to the contrary.

5. *United Mine Workers* v. *Pennington,* 381 U.S. 657 and *Los Angeles Meat Drivers Union* v. *United States,* 371 U.S. 94, cited in the Court's decision, are inapposite. Unlike the Los Angeles "grease peddlers" case, appellant herein has not stipulated as to the absence of economic interrelationship with employee drivers, nor are there factual findings supporting any such conclusion. Whereas in that case, this Court could say that the two groups had "essentially different sources of supply and different classes of customers" (371 U.S. at 98), here the source of supply and the class of customer was identical for both groups (F. 13, 15, 16, 17, 21, 24, 32, 47, 48). It has neither been stipluated nor found that the appellant Union's actions since 1949 have not been directed at protecting employee standards or jobs, or that they are not reasonably calculated to achieve this objective. Nor is the challenged conduct herein part of a pattern of customer allocation and similar predatory practices, as in the "grease peddler" case. Moreover, in that case this Court pointedly noted the absence of any employer threat to convert employees into owner-drivers (371 U.S. at 98). Here the employers did convert house employees into owner-drivers and house routes into owner-driver routes (F. 48). And in contract negotiations with their employee drivers, they regularly threatened to convert house drivers into owner-drivers in order to keep down the driver wage scale (Tr. 1387-

1389). It is difficult to conceive of any more direct or intimate interrelationship.

Unlike *Pennington*, Local 627 did not seek to drive anyone out of business or agree to impose any bargaining terms on employers in other bargaining units. The negotiation of minimum owner-driver discounts, in reality a regulation of wages for physical labor performed, constituted an appropriate means to protect the standards of interrelated unionized drivers. The Government's motion to affirm does not advance any contention to the contrary, urging merely the unfounded, unsupported argument that the requisite interrelationship did not exist.

CONCLUSION

The foregoing points are buttressed by our brief in opposition to the motion to affirm which discusses in greater detail the findings, the uncontradicted evidence and the applicable legal principles. Based upon the foregoing and the arguments more fully developed in that brief, we respectfully urge that there are substantial issues meriting the fuller consideration of this Court, that the decision below is clearly erroneous and totally irreconcilable with this Court's prior decisions, that this petition for rehearing should be granted, and that upon such reconsideration the motion to affirm should be denied.

Respectfully submitted,

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant
501 Fifth Avenue
New York, New York 10017

WALDMAN & WALDMAN
Of Counsel

Certificate of Counsel

The undersigned counsel for Appellant hereby certify that the above petition for rehearing is presented in good faith and not for delay.

Dated: February 17, 1969

LOUIS WALDMAN
SEYMOUR M. WALDMAN
Attorneys for Appellant
501 Fifth Avenue
New York, New York 10017

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627 *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 790. Decided January 27, 1969.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *United Mine Workers of America* v. *Pennington*, 381 U. S. 657; *American Federation of Musicians* v. *Carroll*, 391 U. S. 99, and *Los Angeles Meat Drivers Union* v. *United States*, 371 U. S. 94.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.